Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1931

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The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 20, 1932.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1931.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,

State House.

Attorney General.

JOSEPH E. WARNER.

Assistants.

ROGER CLAPP.
CHARLES F. LOVEJOY.
EMMA FALL SCHOFIELD.[1]
EDWARD T. SIMONEAU.
STEPHEN D. BACIGALUPO.
GEORGE B. LOURIE.
LOUIS H. SAWYER.
EDWARD K. NASH.
DAVID A. FOLEY.
DONALD C. STARR.
SYBIL H. HOLMES.[2]

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

[1] Resigned December 17, 1930.
[2] Appointed December 29, 1930.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1931	$103,000 00
Appropriation for small claims	5,000 00
Supplemental appropriation	15,041 67
Balances brought forward	4,241 08
	$127,282 75

Expenditures.

For salary of Attorney General	$8,000 00
For law library	618 65
For salaries of assistants	47,770 14
For salaries of all other employees	21,720 09
For legal and special services	14,431 44
For office expenses and travel	4,640 50
For court expenses	1,552 93
For small claims	4,994 85
For publication of opinions of the Attorneys General	3,543 17
Total expenditures	$107,271 77

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 20, 1932.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1931, to the number of 8,724 are tabulated below:

Corporate franchise tax cases		1,239
Extradition and interstate rendition		295
Land Court petitions		118
Land-damage cases arising from the taking of land:		
Department of Public Works		121
Department of Mental Diseases		6
Department of Conservation		1
Department of Correction		3
Metropolitan District Commission		54
Metropolitan District Water Supply Commission		15
Miscellaneous cases		762
Petitions for instructions under inheritance tax laws		52
Public charitable trusts		245
Settlement cases for support of persons in State hospitals		6
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth		5,763
Indictments for murder, capital cases		44
Disposed of	33	
Now pending	11	

THE DEPARTMENT OF THE ATTORNEY GENERAL.

The work of the Department comprises the administration of certain criminal and of all civil legal matters affecting the Commonwealth and every department of State government. The former is effected by the Attorney General and the eight district attorneys[1] with their assistants; the latter by the Attorney General and his staff of ten assistants.

I. ADMINISTRATION OF JUSTICE BY PROSECUTION FOR CRIME.

When a crime has been committed the machinery for securing justice requires several operations. Detection and identification of the criminal must first be had; next his apprehension; then prosecution; and, if guilty, correction by fine or imprisonment. The first two are functions of the police, the last is the function of penal, probation and other officers. Prosecution for lesser crimes, called misdemeanors, is had in district and municipal courts, and for graver crimes, called felonies, in the Superior Court. In the broad field of prevention and suppression of crime and law enforcement, the offices of the Attorney General and of the district attorneys have to do only with that phase which deals with prosecution, and then only of such crimes (felonies or misdemeanors appealed from the lower courts) as are tried in the Superior Court.

Except for prosecution of certain violations of law specially charged to the Attorney General by statute, prosecution for crime is the duty of the district attorney in whose district it occurs. The district attorneys, elected by the people of their several districts are the special agencies for this function. They and their assistants confer with the Attorney General four times a year. The common purpose this year has been prompt despatch of business. It has been said that one factor in the prevalence of crime is the calculation of the criminal on congested dockets, enabling delay to his advantage. In Massachusetts prevalence may not be so attributable, for the records of the district attorneys instance swift trials and practical clearance of triable cases from their dockets.

Mr. Bishop (Middlesex) reports that 585 cases were pending on November 30 (263 felonies and 327 misdemeanors). In 311 of these cases, however, defendants have not yet been apprehended. One capital case is awaiting trial. Arrangements were effected for disposition of all triable felonies and misdemeanors in the month of December, assuring practical clearance of the docket for the beginning of 1932.

Mr. Cregg (Essex), that no case remained at the termination of any

[1] Northern District, Warren L. Bishop, Wayland.
Eastern District, Hugh A. Cregg, Methuen.
Southern District, William C. Crossley, Fall River.
Southeastern District, Winfield M. Wilbar, Brockton.
Middle District, Edwin G. Norman, Worcester.
Western District, Thomas F. Moriarty, Springfield.
Northwestern District, Joseph T. Bartlett, Greenfield.
Suffolk District, William J. Foley, Boston.

sitting of the court except by order of the court. He cites one instance where a serious crime was committed and there was indictment, trial and sentence, all within six days.

Mr. Crossley (Barnstable, Dukes, Bristol, Nantucket), that he has disposed of approximately 2,000 cases during the year, and that about 250 cases of felonies and misdemeanors, covering the four counties, are now pending. (These include cases where the defendant has been already defaulted or where he has not yet been apprehended.) Six murders have been committed in the district since July. Celerity of justice was evidenced here, when, in November, exactly seventeen days after a robbery at gunpoint and fracturing of the skull of the victim, two defendants were apprehended, indicted and sentenced to State Prison, one for life and the other for eighteen to twenty years.

Mr. Wilbar (Norfolk and Plymouth), that all dockets are current cases — 6 felonies and 25 misdemeanors in each county.

Mr. Norman (Worcester), that, as of November first, 42 cases were pending (14 felonies, in which 5 have already pleaded guilt, and 28 misdemeanors, in which 19 have already pleaded guilt).

Mr. Moriarty (Hampden and Berkshire), that there were pending on November 30 in Hampden County 127 cases, of which 11 were felonies, including a capital case, and the balance misdemeanors; in Berkshire, 50 cases, 9 of which were felonies; that substantially all the indictments returned in the year ending November 30 will be disposed of within thirty days.

Mr. Bartlett (Franklin and Hampshire), that in Franklin County there are practically no cases for trial and at the next term only one felony and misdemeanor for sentence; and in Hampshire County only 3 felonies and 4 misdemeanors, with trials pending. Evidence of despatch of justice was exampled here when defendants were apprehended the very day of their crime, indicted the next, and four days later sentenced to from three to five years in State Prison.

Mr. Foley (Suffolk), that in this district, where the large population causes a constant reception of cases, and their number and classification not to be of helpful recitation, he has by continuous prosecutions in concurrent sessions effected clearance of every case capable of disposition.

The list of capital cases in detail is annexed, page 24.

Recommendations of the District Attorneys.

1. *That trial of criminal cases be expedited by providing that in a case where a defendant may elect to waive a jury trial such defendant must exercise such waiver within three days after entry of complaint on appeal or three days after arraignment on indictment.*

St. 1929, c. 185, amending G. L., c. 263, § 6, provided that defendants in criminal cases other than capital, might elect under certain circum-

stances to be tried by the court instead of by a jury by filing a waiver of right to jury trial "when called upon to plead, or later." If there might be early exercise of such election, the disposition of cases would be facilitated. Such requirement may be effected by amending said section by striking out, in the tenth line, the words "when called upon to plead, or later and" and by inserting the words "within three days after entry of complaint on appeal in the superior court or within three days from arraignment on indictment or thereafter upon motion in writing with the consent of the district attorney any time," and by striking out the words ", but not, however, unless all the defendants, if there are two or more, shall have exercised such election before a jury has been impanelled to try any of the defendants," and by inserting the words, "If, however, there are two or more defendants involved in the same complaint or indictment the right to elect to waive trial by jury shall depend upon the unanimous election of the defendants so involved."

2. *That date of returns from clerks of courts of standing of criminal business be changed from September 30 to November 30.*

Unless statistics can be made serviceable the value of their compilation is negligible. When out of date before they are assembled, or if classifications are inappropriate, they are capable of gross misinterpretation, and may be cited to prove anything. Upon statistics public opinion and legislation are based. They ought, therefore, to be as accurate, as contemporaneous and as uniform in data and in basis of crime index as possible. Our statutes require clerks of courts to make returns to the Secretary of State of the civil and criminal business of the Superior Court as of June 30,[1] and to the Commissioner of Correction "of all criminal cases commenced in the superior court, and of all criminal cases entered therein on appeal during " the year ending September 30.[2] These two sets of criminal statistics are compiled within three months of each other; the second set portrays the status two months prior to the termination of the State's departmental year and three months before the end of the regular calendar year. A considerable number of cases is usually disposed of at sittings of the court in October and November. Changing the date from September 30 to November 30 to conform with the end of the State's fiscal year would more understandingly portray the annual registry of criminal business in volume and disposition.

To effect such change strike out the word "October" in the first line of G. L., c. 124, § 8, and insert the word "December," and strike out the word "September" in the fourth line and insert the word "November."

Uniformity of returns, in data and classification, is being effected by careful study, and through administrative agencies, which does not require the invocation of legislation.

[1] G. L., c. 221, § 24, amended by St. 1927, c. 64, St. 1928, c. 163.
[2] G. L., c. 124, § 8.

II. ADMINISTRATION OF CIVIL BUSINESS.

Of the great number of cases in which consideration by courts, Federal or State, was requisite, only those with final termination already had or to be had in the highest courts are noted.

A. Cases Decided During the Year.

In the Federal Courts.

1. *United States Supreme Court.*
2. *United States District Court.*
3. *Interstate Commerce Commission.*

The contentions of the Commonwealth were wholly sustained in the only two cases requiring recorded decisions before these two courts[1],[2] and partially in the only one proceeding before the Commission.[3]

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[1] *State of Connecticut* v. *Commonwealth of Massachusetts.* After almost continuous proceedings since it was begun January 3, 1928, the United States Supreme Court, on February 24, 1931, dismissed the bill of complaint of Connecticut to prevent Massachusetts from using the waters of the Ware and Swift Rivers for imperative water supply of the people of Boston and the Metropolitan District, — a case of major importance both in assuring source of pure water to the population and in assuring public works approximated at $65,000,000.

[2] *Blankenburg* v. *Commonwealth.* The United States District Court dismissed petition for writ of *habeas corpus* for release from jail to which the petitioner had been committed by order of a probate court for contempt by obstructing justice through the commission of fraud in attempting to defeat a certain will. Later attempt to appeal was refused. (Previous to commitment to jail, after decision in 272 Mass. 25, upholding the probate court in adjudging contempt, writ for certiorari was denied by the United States Supreme Court March 2) (283 U. S. 819).

[3] *Ex parte 103* (petition of the railroads for rate increases). Upon authority of the Governor, this department opposed, as representing the Commonwealth, the application of the rail and water carriers for a general 15% increase in all rail and rail-water interstate and international freight rates and charges. The Interstate Commerce Commission denied the application October 16, 1931. (Assistant Attorney General Starr appeared at hearings in Portland, Maine, and in Washington, D. C.)

The Commission recognized the weakened confidence in railroad securities due in part to the inability of some of the carriers to meet fixed charges under present conditions and in part to the industrial situation, with which the transportation systems of the country are inextricably bound up, and which, if not averted, might further disturb an "already tremendously shaken financial situation." The Commission suggested an alternative plan, as a temporary measure only, for certain specified rate increases allowable upon acceptance by the carriers and on submission by them of a detailed working plan by December first. In brief, the plan provided for applying the proceeds of the increased rates; part for aid to carriers unable to meet their interest charges; the balance, if any, to be feturned to the contributing carriers from time to time in proportion to their contributions. Increased rates were expressly denied upon commodities such as staple agricultural and mill products, cotton in bales, cotton linters, noils and regins, hogs, logs and other commodities which are transported into the Commonwealth in considerable quantities. The allowable increases are on commodities such as coal, pulp wood, lumber, box, crate and cooperage materials, and products of mines (increase of $3 a car); pig iron, petroleum, rough, finished and artificial stone (an additional $6 a car); certain fruits and vegetables, gasolene, lubricating oils and brick (increased charge of one cent per hundred pounds). The Commission stated that its plan is "designed to avoid imposing burdens on industry which cannot reasonably be borne under present conditions . . . and to disturb business conditions as little as possible by preserving very generally existing rate relations." The contention of the Commonwealth for preservation of existing rate relations so vital to our people and to our industries, therefore, was sustained in some degree, and since the Commission indicates that such was its prime concern in making the recommendations, the intervention, by authority of Governor Ely, minimized the certain serious effect upon our industries, which the schedules originally proposed would have caused.

In the State Courts.

1. *Supreme Judicial Court.*

Sixteen cases invoked decision of the full court. In 14 the Commonwealth was sustained. They relate to a considerable number of topics — initiative and referendum,[1] taxation,[2] liability of towns to the Commonwealth for support in State institutions of minors settled in such towns,[3] powers of departments,[4] and others. [5]

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[1] *Yont* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1931) 1059. Dismissed a mandamus to compel Secretary of State to cause referendum on St. 1931, c. 122, act providing a program for the acceleration of State highway and building construction, and for temporary financial relief to cities and towns by the issue of short-term notes and proceeds of an increase in the gasolene tax.

[2] *First National Bank, Trustee*, v. *Tax Commissioner*, Mass. Adv. Sh. (1931) 667. That gains from sales by a trustee under a revocable trust might, for income tax purposes, be determined on the basis of cost to the creator of the trust.

Kirwin v. *Attorney General*, Mass. Adv. Sh. (1931) 753. That a valid charitable trust had been created by the residuary clause under a certain will and that the power of appointment to charities, left to the executors by name, could be exercised by an administrator with the will annexed.

Central Trust Co. v. *Howard*, Mass. Adv. Sh. (1931) 849. That the fact that a bank had filed a waiver under the special provisions of St. 1930, c. 214, does not prevent the collection of a tax previously assessed.

Worcester County National Bank v. *Commonwealth*, Mass. Adv. Sh. (1931) 1003. Affirmed decree of a probate court that a trust fund given by a man to his wife in consideration of marriage, the principal of which is payable only after his death, is taxable under the inheritance tax laws.

Thomson Electric Welding Co. v. *Commonwealth*, Mass. Adv. Sh. (1931) 1107. That royalties received from patents must be included as income in determining the corporation excise tax; that this requirement is not unconstitutional.

DeBlois v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1931) 1763, to abate a tax assessed to trustees of a real estate trust upon the net income of the trust derived from rents for the use and occupation of real estate, on the ground that it was improperly assessed as an income tax and was in reality a real estate tax, and that taxation of the receipts as income would result in double taxation.

Lee Higginson Safe Deposit Company v. *Commonwealth*, Mass. Adv. Sh. (1931) 1773. That bonds are not deductible as "real estate" in determining the value of a corporation's franchise taxable under G. L., c. 63, § 53 *et seq.*, although such bonds are secured by a mortgage of Massachusetts real estate held by a trustee for the bondholders.

[3] *Treasurer and Receiver General* v. *Inhabitants of the Town of Bourne*, Mass. Adv. Sh. (1931) 995. That a town is liable for the support of a minor settled therein at the Massachusetts Hospital School if the father is financially able to pay for his support, and that the Commonwealth may proceed at its election either against the town or against the parents.

[4] *Standard Oil Co.* v. *Commissioner of Public Safety*, Mass. Adv. Sh. (1931) 227. That it could not be ruled that a certain appellant from the local licensing authorities to the State Fire Marshal was not a "person aggrieved", there being evidence upon which it might have been found that appellant's property might be subject to fire hazard.

Goldberg v. *Commissioner of Civil Service*, Mass. Adv. Sh. (1931) 337. Dismissed a petition to compel the Civil Service Commissioner to authorize reinstatement of a laborer who had become separated from the service by long-continued illness.

Timmins v. *Civil Service Commissioners*, Mass. Adv. Sh. (1931) 1447. That the Civil Service Commissioners had power to hold an open competitive instead of a promotional examination, at least when so requested by the appointing power, and where only one applicant had presented himself for a promotional examination.

Ott v. *Board of Registration in Medicine*, Mass. Adv. Sh. (1931) 1855. Reversed the decree of the board revoking the petitioner's registration because of its failure to allow the petitioner proper cross-examination of the complaining witnesses.

Ganim's Case, Mass. Adv. Sh. (1931) 2063. Sustained the findings of the Industrial Accident Board, in a workmen's compensation case, of no liability upon the Commonwealth as an employer.

[5] *Old Colony Crushed Stone Co.* v. *Cronin et al.*, Mass. Adv. Sh. (1931) 1529. In a bill in equity to enforce a creditor's lien, against the security held by the Commonwealth for payment by the contractor and subcontractors for labor performed or furnished and for materials used or employed by virtue of the terms of a contract, where a bank intervenor claimed moneys due under said contract assigned to it by the contractor as collateral security for a note, and where, after notice of said assignment, the Commonwealth, ignoring same, paid the contractors the sums purported to be covered by the assignment, and where, on appeal by the bank, the Commonwealth set up the provision in its contract prohibiting the assignment of any money payable under the agreement or of the contractor's claim thereto without the previous

B. Cases pending November 30, 1931.

1. In the Federal Courts.

United States Circuit Court of Appeals.

There are two extradition cases which were tried in the United States District Court and later in the United States Circuit Court of Appeals, and which await decision.[1]

2. In the State Courts.

Supreme Judicial Court.

Nine cases[2] relating to taxes and departmental powers await decision;

written consent of the commission executing the contract, it was held that "the payments . . . did not operate as a waiver of the provisions in the contract as to assignments of money payable under the contract"; that the provision against assignment "is a valid agreement binding upon the parties and upon any one undertaking to assert rights thereunder"; that "as the provision in the contract was valid and the assignment was unenforceable against the Commonwealth, the payment to the contractors after notification of the assignment was a discharge of its obligation under the contract."

Hilton v. *Hopkins*, Mass. Adv. Sh. (1931) 717.

Bahan v. *Treasurer and Receiver General*, Mass. Adv. Sh. (1931) 1827.

Both cases related to appointment of an administratrix, alleging existence of heirs, in place of the public administrator, who had been appointed, and discovery that the alleged heirs were not in fact heirs. In the former case, it was held that the probate court might not revoke the appointment of the administratrix, in the absence of fraud, in order that the public administrator might reassume administration. In the latter, on motion of the Treasurer and Receiver General to dismiss the appearance of the alleged heirs from the docket (so that the money might come to the Commonwealth's treasury), it was held that the probate court could properly determine whether or not persons were true heirs at any later stage of the proceedings, although having passed upon the heirship at an earlier stage. (Some $10,000 had been misappropriated, but was recovered from the surety company, which, after deduction of expenses, escheats to the Commonwealth.)

Single Justice.

Arute Bros. Inc. v. *Lieutenant Governor and Executive Council.* Dismissed mandamus to require the Executive Council (which had refused to approve a contract because of non-residence) to approve or disapprove a contract with the Department of Public Works for construction of a State highway in Randolph.

Coleman Bros. Inc. v. *Commissioner of Public Works.* Dismissed petition for mandamus to Commissioners to award a contract.

[1] *Lee Gim Bor* v. *Joseph L. Ferrari; Raftery ex rel. Huie Fong* v. *Thomas E. Bligh.*

[2] *Hultman* v. *Civil Service Commissioner.* Whether members of the Boston police department, who have been suspended, may be reinstated without approval of the Civil Service Commissioner.

Grant v. *Department of Public Utilities.* Whether a service charge for gas is permissible under the statutes.

Hornblower et al. v. *Tax Commissioner.* Whether a certain distribution of stock on reorganization is taxable as a dividend or as a sale.

First National Bank, Trustee, v. *Tax Commissioner.* Whether a trustee of a Vermont estate, resident here, may constitutionally be required to pay a tax on account of income payable to a Massachusetts beneficiary.

Ness v. *Tax Commissioner.* Whether one having left the Commonwealth and being *in itinere* to his new home on January first is subject to the Massachusetts income tax for the preceding year.

Ruth E. Madden, executrix and trustee, v. *Charles J. Madden et als.* Whether decree of the probate court that it was not the duty of a trustee to make payments to the guardian of an inmate for the board and support of his ward at a State hospital should stand.

Davis v. *Commissioner of Corporations and Taxation.* Whether or not, under G. L., c. 65, § 13, where a trust has been created, the income payable to the settlor for life, with remainder in fee to B and B predeceases the life tenant, leaving by will the remainder to C, the tax is based upon the value of the remainder as of the date of death of B or of the settlor. At the death of B the remainder interest was valued at about $145,000 and at death of settlor approximately $228,000, on which value the Commissioner of Corporations and Taxation assessed a succession tax, which determination of value was sustained by the Board of Tax Appeals and by the probate court.

Worcester Bank & Trust Co. v. *Commissioner of Corporations and Taxation.* Whether or not decision by a probate court which upheld the Commissioner of Corporations and Taxation in assessing a tax upon a charitable trust where there was a possibility that a charity might eventually be carried outside of the Commonwealth, was proper.

seven have already been argued. The so-called Billboard Cases[1] (25 cases consolidated into one case) are now before a master.

Dunn v. *Civil Service Commissioner.* Whether a leave of absence granted to a police officer under civil service constituted a "separation from the service" as those words are used in the Civil Service Rules.

[1] At the State election of November 5, 1918, there was approved by a vote of 193,925 to 84,127 Article L of Amendments to the Constitution, which provides as follows:

"Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law."

Pursuant to this power, the Legislature enacted St. 1920, c. 545. The statute required the Division of Highways of the Department of Public Works to "make regulations for the proper control and restriction of billboards and other advertising devices on public ways or on private property within public view of any highway, public park or reservation . . ." It provided that the Division should, before establishing or amending its rules or regulations, "hold duly advertised public hearings in the city of Boston and elsewhere in the commonwealth as it deems necessary or expedient"; also that cities and towns might further regulate and restrict the advertising devices within their limits, subject to the approval of the Division. It exempted from the operation of the statute and regulations thereunder signs advertising or indicating the person occupying the premises or the business transacted thereon, or advertising the property itself as for sale or to let, as well as signs on the property of or used by common carriers.

Pursuant to the statute the Division of Highways promulgated rules on December 20, 1920; later superseded by other rules becoming effective July 1, 1921. In August and September, 1923, two public hearings were held on the subject of a proper regulation of outdoor advertising, as well as of the economic importance of the business. On January 24, 1924, the Commissioners promulgated a new set of rules and regulations, affecting between 75% and 90% of all outdoor advertising signs then existing in the Commonwealth by requiring either their removal or their relocation in order to comply with the new limitations as to size of structures and distance from public ways, parks and other public places. Among the restrictions thus imposed were the provisions that no advertising devices should be permitted to be located nearer than 50 feet to a public way, nor nearer than 100 feet if of an area of more than 32 square feet, nor nearer than 300 feet if larger than 25 by 12 feet, and that no advertising device would be permitted "near certain public ways where, in the opinion of the division, having regard to the health and safety of the public, the danger of fire, and the unusual scenic beauty of the territory, signs would be particularly harmful to the public welfare."

In June, 1925, bills in equity were brought in the Supreme Judicial Court for Suffolk County by a large number of outdoor advertising interests, including General Outdoor Advertising Co., Inc., O. J. Gude Co., Thomas Cusack Co., Old Colony Advertising Co., John Donnelly & Sons, Springfield Advertising Co., R. C. Maxwell Co., Seeley & Company, Inc., Connors Poster Adv. Co., The Kimball System, Inc., F. H. Birch Co., Riley Advertising Service, Maurice Callahan & Sons, Donnelly Co. of Worcester, Hathaway Advertising Co., Fall River Poster Adv. Co., Lawler Bros. Poster Adv. Co., Woonsocket Poster Adv. Co., Standish-Barnes Co., Newburyport Poster Adv. Co., Lowell Poster Adv. Co., Lawrence Poster Adv. Co., Cloughly Sign Co., and Buchholz Company, against the Commissioners of Public Works praying that they be enjoined from proceeding against the complainants in any way under the rules and that all of the rules and regulations be declared unconstitutional. The court granted a temporary injunction against any interference with the plant and business of the complainants, which is still in force, and the cases, having been consolidated into one for convenience, were referred to a master, who heard the parties and their evidence on 114 days and took a view of advertising devices in different parts of the Commonwealth, traveling approximately 1,000 miles with counsel for that purpose. The master filed his report on June 2, 1931. To this the Commonwealth had no objections. But objections and a motion to recommit were filed by the complainants, the outdoor advertising interests. Lengthy hearings were held in August before Mr. Justice Pierce of the Supreme Judicial Court, and in September the report was recommitted by the Justice to the master.

Extensive hearings have been held before the master since, and he is now engaged in preparing with the assistance of counsel a supplemental report in accordance with the decree of recommittal.

The issue involved is of nation-wide interest and importance. As the issue is the constitutionality of the statute and of the regulations, it is of the very essence that every material fact be presented to the court. With a record, as voluminous as is the record in these cases, and where twenty-five parties have attacked the validity of the statute, it is inevitable that it will take time to comply with the recent decree of the court, however persistent the Attorney General may be in continuing plea and effort for determination of the issue.

The assistant attorney general who conducted the case for the Commonwealth continues to conduct it as a special assistant; an assistant attorney general is also devoting all of his time to the case. The Commonwealth has never failed to be ready. The protraction of the case, however, appears to discount the right of the sovereign people to a determination of their will, thus disputed by these interests. Suffice to say that the Constitutions of Massachusetts and of the United States ensure to every person assertion and patient consideration of alleged constitutional rights regardless of partisan viewpoint.

III. STATUTORY SERVICES.

Of the great number of varying services, required by many statutes, which comprise the department's routine, a few only are here noted.

1. Small Claims.

Under the act [1] enabling settlement of certain claims by the Attorney General upon finding of damages under $1000, 98 claims were filed, and 32 were approved with a total award of $4,994.85. Of the 32 claims 17 were the result of collisions with state-owned vehicles; the others arose out of defects in property of the Commonwealth, loss at State institutions, and other miscellany. Sixteen were rejected. Fifty are still pending. The appropriation for the purpose is but $5,000.

2. Defense of State Employees in Certain Suits against Them.

Under the statute just effective [2] (G. L., c. 12, § 3, amended by St. 1931, c. 458, § 1) requiring the Attorney General to defend State employees sued for personal injuries arising out of accidents while driving state-owned cars in the course of their duty and for payment of judgments up to $5,000, two suits have already been brought.

3. Public Charitable Trusts.

The principal consideration with respect to a charitable trust is the application of the trust to purposes most nearly like the original purpose in the event it may not longer be carried out according to its exact terms. Fourteen charitable trusts invoked such consideration this year. [3]

By St. 1931, c. 42, every trustee, incorporated or unincorporated, holding in trust property for the use of charitable purposes, whether such trust was created by will or *inter vivos*, must file reports yearly with the Department of Public Welfare. Corporations and well known welfare organizations can be reached for questioning. The statute does not indicate the mode of discovery of a trust created *inter vivos*, and where an individual is trustee.

4. Public Administrators.

The 57 public administrators in the Commonwealth filed their first and final accounts in 573 cases, with escheats to the Commonwealth from 179 of $116,664.74. One public administrator filed 325 of these accounts, with 122 of the paid escheats, amounting to $73,246.82.

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[1] St. 1924, c. 395.

[2] September 10, 1931.

[3] Of these, the most important was that of the Andover Theological Seminary, where, as a result of the decision of our court (*Trustees of Andover Theological Seminary* v. *Visitors of the Theological Institution in Phillips Academy in Andover*, 253 Mass. 256) that the Andover Theological Seminary could not merge with Harvard University, the seminary was closed for six years because the professors resigned, owing to their inability to subscribe literally to the doctrines of the Andover creed as understood in the early part of the nineteenth century, relief from the restrictions was decreed by the Supreme Judicial Court at *nisi prius* by modification which enabled Andover Seminary to retain its identity though joined with the Newton Theological Institution.

Court action was taken against two public administrators. Eight public administrators have no cases pending. The rest have 347 cases outstanding, with cash in hand of approximately $400,485.30. It is impossible to say how much of this, if any, will eventually escheat to the State, as the time for administration has not expired and the existence of heirs, claims of creditors, administration charges, etc., have not yet been determined.

5. Institution of Prosecution for Alleged Violation of Banking Laws on Report of the Commissioner of Banks.

G. L., c. 167, § 5, provides that the Attorney General shall forthwith institute prosecutions on report of the Commissioner of Banks. Prosecutions were instantly instituted on receipt of reports, by invoking the service of the district attorney in whose district alleged violations occurred.

6. Services Required by the Legislature.

Services required by House Order relative to procedure in committal and discharge of alleged insane persons; [1] by Resolve relative to codification of laws relating to marine fisheries; [2] and by Resolve relative to advisability of providing means for facilitating reference to special laws relating to any particular city, town or other political subdivision of the Commonwealth by tables of changes, indices or otherwise.[3]

7. Industrial Accident Cases; Approval of Contracts, Deeds and Titles.

The Department represented the Commonwealth in 36 contested claims for workmen's compensation made by employees of the Commonwealth under the provisions of G. L., c. 152, as amended; appeared in the Superior Court in the matter of 16 petitions and numerous intervening petitions to enforce liens against the security obtained on contracts as provided in G. L., c. 30, § 39, as amended; and filed 2 bills in the Superior Court in the nature of interpleader.

There has been an appreciable increase in the number of contracts submitted to the Department for examination and approval as to form this year over the number submitted a year ago, as well as in the number of deeds and releases submitted for examination and approval as to form and title.

8. Appearances for Departments in Petitions for Release from Their Custody.

Only 3 of the 40 petitions for discharge were granted.

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[1] Assistant Attorney General Bacigalupo.
[2] Assistant Attorney General Starr.
[3] Assistant Attorney General Simoneau.

9. Applications of Other States for Return of Fugitives from Justice; Application of the Commonwealth for Return from Other States of Persons here charged with Offenses.

There were 57 applications of other States. After examination, hearing and report 53 were found to be in proper form. The Commonwealth made 238 applications to other States and the return of 234 fugitives for trial here was effected. Of these 101 persons were brought back on charges of desertion, non-support and neglect of wife and children.

10. Opinions.

Such opinions as are deemed to be of general interest are annexed.

IV. OBSERVATIONS.

In the course of consideration of matters of wide range either peculiar to this Department or to some one of the other nineteen departments of State government it serves, occasion for observations is afforded.

1. *That the recommendations in the excellent report of the special commission for rendering questions upon the ballot understandable, based in part on recommendations of the Attorney General in his last annual report, be given favorable action.*

Unless action be taken at this session, submission to the people of a constitutional amendment enabling simplification cannot be had before 1936, and it cannot function before 1938.

2. *That the question of abolition of the death penalty be given study.*

3. *That jury service for women in trials of civil cases be reconsidered.*

4. *That with respect to settlement of small claims, the Legislature determine a policy as to recognition by the Attorney General of claims for property damage, as it has for personal injuries, occasioned by highway defect or by military operations.*

Claims arising out of accidents caused by defects in State highways, and resulting in property damage, have been rejected for the reason that the Legislature has indicated a policy of reimbursement solely for personal injuries. (G. L. c. 81, § 18.) Counties, cities and towns are now liable for bodily injuries and property damage sustained by persons while traveling on ways. (G. L., c. 84, § 15.)

Similarly, the National Guard has authority to settle claims for property damage but not claims for personal injuries (G. L., c. 33, as amended by St. 1924, c. 465). Claims with proof of property damage, presented under section 140 to the Adjutant General, have been necessarily denied, and on subsequent presentation to the Attorney General under the Small Claims Act were rejected because of the limitation of the statute.

5. *That the Legislature consider the creation of the position of title examiner in the Department to effect economy.*

Bills submitted during eight months by department heads for examination of real estate titles and service incident thereto, for the payment of which it has been the practice to make provision in appropriations for land takings, have averaged approximately $1,600 per month. This recommendation was made several times by my predecessors.

6. *That provision be made for impartial examination and report by experts as to real estate values in land damage or betterment cases.*

Trial of cases against the Commonwealth discloses an amazing variance in the values of real estate in the opinion of experts — as low as $5,000 and as high as $100,000 on the same parcel sometimes appears.

The various real estate exchanges realize the danger of excessive verdicts from such testimony, since the consequent taxable burden must be borne by real estate. They are making a commendable effort to eliminate variances of opinion as to land values whose extremes appear incredible to lay judgments.

Similar variances in medical testimony as to sanity or insanity of persons charged with crime and as to injuries compensable under the Industrial Accident Laws were remedied by enactment of measures for impartial examination.

If expert evidence is to be offered, it would seem fair that a general statement as to the values to be set by the experts should be filed preliminary to trial and that, if the variances were considerable, engagement of impartial experts be authorized.

7. *That the word "pauper" be stricken out in the election laws.*

G. L., c. 51, § 1, provides that "every citizen twenty-one years of age or older, not being a pauper or person under guardianship," etc., "may have his name entered on the list of voters. . . ." The use of the word "pauper" has been abandoned in laws relating to public welfare and public aid, and its retention gives rise to uncertainty and doubt. The change can be effected by striking out the word and inserting such description as the Legislature may deem appropriate.

8. *That section 3 of article XLVI of the Amendments to the Constitution be amended so that payments may be made under the Old Age Assistance Act to institutions privately controlled, caring for persons eligible to receive such pension, as well as to privately controlled institutions caring for the deaf, dumb and blind, now permitted.*

Aid under the Old Age Assistance Act is furnished to certain people seventy years of age or over who need assistance and who are possessed of certain qualifications. In a number of cases these old people are in privately controlled charitable institutions. They have been in them for a number

of years, and due to management and facilities are cared for and supported therein at much less expense to the State or the municipality than elsewhere.

It has been brought to my attention that municipalities and the Commonwealth doubt legality of payments to such persons because of residence in such homes, and do not aid them lest the payments be deemed *in aid of* the institutions. Consequently, if any of such persons are to be aided, they must move to private homes, with less contentment, and with greater expense to a municipality than there would have been had they been allowed to remain where they were.

The doubt is occasioned by the operation of section 2 of said article XLVI, which prohibits public money from being expended *in aid of institutions not publicly owned and controlled*, and because the provisions of section 3, while exempting privately controlled hospitals, infirmaries and institutions for the deaf, dumb and blind from the operation of the amendment, do not exempt privately controlled charitable homes caring for and supporting elderly persons entitled to the benefits of the Old Age Assistance Act.

Removal of this doubt may be effected by a constitutional amendment,[1] extending to private institutions for aged persons the present authorization for expenditures of public moneys to private institutions for the deaf, dumb and blind.

9. *That when a person qualifies as surety in bail cases involving felony by real estate a lien shall be recorded against the real estate until the case is finally disposed of or until the court otherwise orders.*

This recommendation was made by one of my predecessors, Jay R. Benton, in 1926, and has been repeated since. Prosecution for disposing of or encumbering the real estate during pendency does not compensate the Commonwealth for defeat of the bail.

10. *That the so-called thrift accounts, such as Christmas, vacation and tax clubs, be segregated from other accounts so that by contract depositors may receive the same when completed, unhazarded by invocation of restrictions applicable to general deposit and drawing accounts.*

Recent inability of subscribers to Christmas clubs to make withdrawals after faithful compliance with agreements for deposit, because of invocation authorized by present statutes, of requirement of ninety days' notice for withdrawal of general deposits, occasions this suggestion.

11. *That banks be prohibited from engaging in general brokerage business in securities and from selling to trusts or estates within their control securi-*

[1] "Nothing herein contained shall be construed to prevent the Commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, institutions for the deaf, dumb and blind, *or institutions wherein are persons eligible to receive old age assistance*, not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries *or* institutions to such persons as may be in whole or in part unable to support or care for themselves."

ties in which they have an interest as principal, broker or underwriter, and that an officer of the bank be prohibited from becoming an officer of any corporation engaged in the business of buying and selling securities.

It seems to me that banks and trust companies have become engaged in pursuits foreign to their original purpose, such as dealing in securities and in the administration of estates and trust properties, and that banks and trusts should be restricted to their primary purpose.

Crisis has demonstrated the general strength of savings banks. The quicker commercial banking is divorced from the opportunity of speculative ventures the better. Not to precarious economic vicissitudes, but to the sins of avarice and cupidity of some in high banking circles, who control managers of smaller banks, is directly traceable the plight of depositors in some of the closed banks throughout the country. The predicaments are man made. Bitter is the experience, but if vital truth and principle are realized and established, the experience will not have been in vain, though restitution of its material wastage may not be effected.

12. *That banks be prohibited from drawing wills and legal documents which have nothing to do with banking.*

There is no reason why a bank, any more than any other institution, should enjoy prerogatives peculiar to the legal profession. Every man a job and each man his own.

13. *That the protection of the Sale of Securities Act be extended to include in "securities" the term "investment contract."*

There are enterprises for investment purposes whose offerings are so phrased that in strict legal sense they do not come within the definition of "security," in G. L., c. 110A, § 2 (c). Adding the words "investment contract," would bring them under regulation of the act.

14. *That the recodification and revision of the entire law relating to the sale of securities be prosecuted to completion.*

The Legislature recognized this need two years ago, when it directed the Department of Public Utilities to conduct an investigation and to report its recommendations for revision, improvement, codification and specification of the laws regulating the sale of securities. This report was made to the Legislature last year and was considered by the Committee on Banks and Banking, together with recommendations of the Attorney General, and various bills introduced by individuals during a lengthy series of hearings. Considerable time was spent by the Attorney General and the Director of the Division of Securities in studying the draft act proposed by the Department of Public Utilities.

Massachusetts, in 1921, was one of the first States to enact so-called "Blue Sky" legislation. It has not been changed to any appreciable extent

since. The past ten years have been marked by many changes in the business of selling securities. We should meet the changes which have been wrought in the security business during that period. It is vitally necessary that the laws relating to the sale of securities be revised and brought up to date.

15. *That the rights of the Director to suspend or revoke the license of a registered broker be extended to cover illegal sales of securities as well as fraudulent sales of securities without the necessity of a conviction in court.*

No security may be sold unless notice of intention to sell is filed with the Department of Public Utilities and the requested information is furnished. If, however, a registered broker sells without such compliance, his registration can not be revoked by the Director unless or until he has been convicted of a violation of the Sale of Securities Act in court. "Conviction" as used in this chapter has been construed to mean final conviction after appeal, so that if a broker is convicted in the lower court and takes an appeal to the Superior Court, his registration can not be revoked until after a trial and conviction in that court.

16. *That no advertisement relating to the sale of a security may be inserted in any periodical, publication, market bulletin or tipster sheet except by a registered broker, and that no one, other than a registered broker, be permitted in any way publicly and generally to disseminate information and advice relating to securities.*

A present day evil is the dissemination of fraudulent, misleading information relating to securities. The so-called tipster sheets have aided the marketing of worthless securities or the market manipulations of speculators and market operators. The Director may revoke or suspend the license of persons who are registered with the Department of Public Utilities as brokers. If not so registered, there is no effectual means of regulation. It is most difficult to show that the person providing the information so benefits by the exploitations as to prove conspiracy.

The Director of the Sale of Securities Division should be given unequivocally and definitely the power to deal with the registration of a broker who practices fraud or deception in promoting securities, by giving advice to the general public concerning their value. Such power would not prevent the giving of advice to individuals but would prevent general and public dissemination of information, except by a registered broker, by any means whatsoever, whether through a newspaper, market bulletin, tipster sheet, circularization by letters or telegrams, or radio broadcasting. Until the right to advise or give general information regarding securities is limited to persons over whom there is an element of control, through revocation or suspension of licenses for wrongful use, the practice of broadcasting false and misleading information can not be effectively curbed.

17. *That a commission representative of all groups be established to review and study the regulation of investment trusts and report its findings and recommendations to the Legislature.*

The past decade has witnessed a wide-spread and rapid growth of the type of financial institution which was little used prior to this period — the investment trust or corporation. The earlier investment trusts were mainly of the so-called management type and were sponsored in many instances by the leading banks and brokerage houses in the country. The stock in such trusts was sold to the general public chiefly upon the representation of the organizers and managers and their advertised ability to profit to the maximum from the general rise in security values. There were and are some trusts of the management type, which were and are properly, honestly and efficiently managed. The practically unlimited control over the fund of many trusts, however, was greatly abused by the managers. Gross and unreasonable profits were made by some of the trust managers and so-called insiders. These trusts were made the receptacles for unloading vast amounts of unsalable securities owned or controlled by the managers of the trust or persons affiliated with them. Little or no information regarding the trusts was given to the stockholders. Their financial statements usually selected some date of greatest activities, oftentimes some months prior to the appeal for investment, though it was known at the time of appeal that the structure had vastly changed during the interim. To escape barefaced fraud these statements would carry a sufficient number of asterisks for small print subnote explanations of the purposely heavy typed emblazoned items on which they intended the investor should rely.

Experience in investment trusts and trusteeships during the present episode has revealed the weakness of those which have not been conservatively conducted. Investors, doubting their own judgment, turned to investment trusts in the belief that they were getting a diversified investment; that the companies selected would be sound; that the trustees would use every precaution to keep a careful check on the affairs of the operating companies. They supposed that a "trust" would assure the degree of care and prudence commonly expected from a handler of trust funds. Unfortunately, tragic facts did not support the supposition.

I believe that few, if the facts were known, had an advisory staff of statisticians to warn trustees as to the soundness of investments. Some investment trusts have seen the evil consequent to the appalling losses occasioned by such lack and are now advertising such equipment as a feature. If investment trusts are to pose as sound, prudent and expert investment houses, they should be required to have the equipment to justify such rôle.

The Legislature recognized the possibility of evils and sought in some measure to prevent them. In 1929 it authorized the Director of the Sale

of Securities Division to require the filing of complete and adequate information. This act was not sufficiently comprehensive to provide an adequate check upon the activities of investment trusts.

More recently there has arisen in the security world a new type of investment trust or corporation, the so-called fixed or semi-fixed type. This type of investment trust was created with the intention of eliminating the evil of misuse of managerial authority of the earlier type of trust. The securities which may be purchased with the trust funds are specifically set forth in the trust indenture and the changes and conditions under which the securities may or should be sold are also so specifically provided. The chief advantage claimed by these trusts is that diversification of investment by a person of small means is permitted. The provisions of the 1929 act cover this type of investment trust as well as the management type but regulate only the rendition of necessary information. There are now no provisions whatever relating to the structure of these trusts.

All institutions, other than investment trusts, to which the funds of the general public are widely entrusted are subject to strict supervision by the State. Trust companies, savings banks, credit unions, and small loan agencies are all under the direct supervision of the Commissioner of Banks. Insurance companies, both stock and mutual, are under the direct supervision of the Commissioner of Insurance. The amount of moneys of the general public entrusted to investment trusts has steadily grown so that it is now comparable to that entrusted to banks or insurance companies. Many jurisdictions have passed laws or created agencies within the State government to regulate investment trusts and specifically prescribe many of the features of such institutions. Such regulations prescribe the amount of loading permitted to be included in the price of the securities of such investment trusts, the method of making distributions, limitations upon the dealings by such trusts in their own stock, and regulate other features of such investment trusts. In my opinion the entire subject of further regulation of investment trusts is one that merits extended study, consideration and action by the Legislature, and the only way in which it may be had intelligently, comprehensively and wisely is by a commission.

18. *That the matter of regulation of the practice of short selling also be referred for exhaustive study to such a commission representative of all interests involved.*

Last year I earnestly recommended legislation prohibiting the lending to short sellers stock bought and sold for customers' accounts, and narrated the method by which purchasers of stock on part-payment plan were ruthlessly exploited. The president of the New York Stock Exchange has vigorously defended short selling. It has been as vigorously denounced by many leading economists and financiers. The United States Senate has

taken cognizance of the situation in the resolution of Senator Capper promising, there, the rigorous investigation it deserves.

19. *That if there is to be a special commission for consideration of milk regulations, such commission should consider the extent to which administrative practices fail to conform to the statutes and in what respects, if any, the statutes should be revised in conformance with these practices.*

For example, it is not customary to require retail dealers in milk to obtain permits for sale or delivery of milk from local boards of health, although G. L., c. 94, § 43, in terms, requires every "dealer in milk" to obtain such permit before selling the same.

A part of the phraseology[1] of G. L., c. 94, § 15, has been recited as evidence of the legislative intent to empower local boards of health to establish grades or classifications of milk other than those already established by statute or by the Department of Public Health, although, in my opinion, there was no such legislative intent. The elimination of certain words[2] would remove such ambiguity.

20. *That there be restored the liability, removed in 1931, upon officers of business corporations for false material representations in statements or reports to the Commissioner of Corporations which they "on reasonable examination could have known to be false."*

St. 1931, c. 313, § 1, amending G. L., c. 156, was passed to relieve officers from injustice or liability for errors in items of the statement despite substantial accuracy of the whole statement.[3] In giving this relief the statute also relieved officers, who would have been held liable under the former statute, from responsibility for misrepresentations which, on reasonable examination, they would have known were false. This responsibility was created in 1911. Under a decision,[4] interpreting a statutory provision substantially the same as now appears in the present statute, the officers escaped liability if they were "men whose time was fully occupied with other business" and if the facts at time of misstatement had "escaped their recollection" although if they "had given the matter consideration, they would have remembered" the facts misstated.

Certificates of condition are for the information of the public and the public have right to the truth.

21. *That agents and brokers dealing in compulsory automobile insurance be required to keep books and records prescribed by the Commissioner of Insurance, to which the Commissioner or other public officials charged with the responsibility of protecting the public shall have access.*

The recent collapse of three companies dealing in automobile insurance, requiring receiverships and entailing losses to those insured in them and

[1] "the name of the grade as it is determined by such board."
[2] "as it is determined by such board."
[3] *United Oil Co.* v. *Eager Transportation Co.*, Mass. Adv. Sh. (1930) 2281.
[4] *Felker* v. *Standard Yarn Co. et als.*, 150 Mass. 264 (1889).

to injured persons records a pitiful story. The activities of the third company more or less succeeded to those of the others. Practices, whether lawful or not, put in hazard that protection against losses purposed by the compulsory insurance law. One of these companies acquired a charter of an old Massachusetts mutual company which, by reason of its age, was exempted from the amount now required to be in a company's treasury in paid-in premiums before starting business. Instead of $100,000 only $50,000 was required. This is an example of how schemes may be effected "within the law." The insureds appear to have been passed along from one company to the other with resultant confusion as to which company, if any, carried the supposed coverages. Denial was made by each company of coverages in face of the fact that premiums were paid to someone purporting to represent some one of them. Some of the agents and brokers appear to have been identified with more than one company in such manner as to suggest community of enterprise. They appear in some instances to have conducted business by pocket transactions. The victims who suffered most grievous treatment were the taxicab operators of whom, by reason of the nature of their business, it was easiest to take advantage. Government regulation of private business should be avoided as much as possible, but where ruthless practices prevail in matters where the people are required to encounter them their only recourse for protection is to their government.

CONCLUSION.

To the Assistant Attorneys General, to all others associated in the department, to the District Attorneys, members of police, State and municipal, upon whose fidelity, ability and co-operation depends the entire administration of the office of Attorney General, I express gratitude.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General.

DETAILS OF CAPITAL CASES.

1. Disposition of indictments pending Nov. 30, 1930:

Eastern District (Essex County cases: in charge of District Attorney Hugh A. Cregg).

Daniel Manzeiu.

Indicted September, 1916, for the murder of Yousefka Manzeiu, at Peabody, on Aug. 28, 1916; arraigned June 5, 1931, and pleaded not guilty; trial June, 1931; verdict not guilty by reason of insanity; thereupon committed to the Danvers State Hospital for life.

Bernardo S. Thompson.

Indicted September, 1930, for the murder of Katherine E. Wight, at Saugus, on July 16, 1930; arraigned Sept. 22, 1930, and pleaded not guilty; May 26, 1931, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Middle District (Worcester County case: in charge of District Attorney Edwin G. Norman).

Leon Trudeau.

Indicted May, 1930, for the murder of Cecelia Trudeau, at Webster, on Feb. 22, 1930; arraigned May 21, 1930, and pleaded not guilty; trial June, 1930; verdict of guilty of murder in the second degree; claim of appeal dismissed; thereupon sentenced to State Prison for life.

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Joseph Belenski, *alias.*

Indicted September, 1930, for the murder of Wincenty Stefanowicz, *alias*, at Stow, on May 25, 1930; arraigned Sept. 8, 1930, and pleaded not guilty; trial November, 1930; verdict of guilty of murder in the first degree; motion for new trial and assignments of error denied and exceptions overruled; thereupon sentenced to death by electrocution, which sentence was carried out Oct. 22, 1931.

John Furtado.

Indicted November, 1930, for the murder of Antonia Furtado, at Cambridge, on Oct. 19, 1930; arraigned Nov. 6, 1930, and pleaded not guilty; trial December, 1930; verdict of guilty of murder in the first degree; motion for new trial allowed Feb. 14, 1931; March 6, 1931, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than ten years nor more than fifteen years.

Raymond C. Oliver.

Indicted April, 1930, for the murder of Mito Christo, at Natick, on March 14, 1930; arraigned March 24, 1931, and pleaded not guilty; Oct. 27, 1931, *nolle prosequi.*

Joaquim Pita Soaris.

Indicted March, 1930, for the murder of Angelina Rodrigues, at Lowell, on March 2, 1930; arraigned March 26, 1930, and pleaded not guilty; trial May, 1930; verdict of guilty of murder in the first degree; motion for new trial and assignments of error denied; thereupon sentenced to death by electrocution; July 1, 1931, sentence commuted by Governor and Council to imprisonment at the State Prison for life.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Thomas G. Healey.

Indicted in Norfolk County, September, 1930, for the murder of Joseph P. O'Brien, at Brookline, on Aug. 3, 1930; arraigned Sept. 15, 1930, and pleaded not guilty; released on bail Dec. 16, 1930; June 1, 1931, *nolle prosequi*.

Paul Hurley.

Indicted in Norfolk County, September, 1930, for the murder of Joseph P. O'Brien, at Brookline, on Aug. 3, 1930; arraigned April 6, 1931, and pleaded not guilty; trial June, 1931; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution, which sentence was carried out Sept. 15, 1931.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Garabad Minasian.

Indicted August, 1930, for the murder of Lucy Minasian on Aug. 3, 1930; arraigned Aug. 11, 1931, and pleaded not guilty; Dec. 2, 1931, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than ten years nor more than twenty years.

Leong Sang, *alias*, and William Fung, and Ung Hong Yun, *alias*, as accessory before the fact.

Indicted August, 1929, for the murder of Yee Toon Wah on Aug. 5, 1929; Sang arraigned Sept. 5, 1929, Fung on March 28, 1930, and Yun on Aug. 12, 1929, and each pleaded not guilty; trial April, 1930; verdict of guilty of murder in the first degree as to Sang, and verdicts of not guilty as to Fung and Yun; Sang's motion for new trial and claim of appeal denied; thereupon sentenced to death by electrocution; June 3, 1931, sentence commuted by Governor and Council to imprisonment at the State Prison for life.

2. Indictments found and dispositions since Nov. 30, 1930:

Eastern District (Essex County case: in charge of District Attorney Hugh A. Cregg).

Russell B. Noble.

Indicted May, 1931, for the murder of Clara E. Ellis, at Haverhill, on Feb. 26, 1931; arraigned May 25, 1931, and pleaded guilty to murder in the second degree; plea accepted; thereupon sentenced to State Prison for life.

Middle District (Worcester County case: in charge of District Attorney Edwin G. Norman).

Harry Harrison.

Indicted August, 1931, for the murder of Samuel Hakala, at Winchendon, on June 9, 1931; arraigned Aug. 28, 1931, and pleaded not guilty; Nov. 2, 1931, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than eighteen years nor more than twenty years.

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Salvatore Colledanchise.

Indicted May, 1931, for the murder of Esther Colledanchise, at Somerville, on April 18, 1931; arraigned May 8, 1931, and pleaded not guilty; May 20, 1931, committed to Bridgewater State Hospital until further order of the court.

Edward A. Nolan.

Indicted December, 1930, for the murder of James Nolan, at Everett, on Nov. 12, 1930; arraigned Dec. 2, 1930, and pleaded not guilty; Jan. 23, 1931, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to the house of correction for eighteen months.

Leroy B. Skillings.

Indicted June, 1931, for the murder of Catherine Skillings, at Dracut, on May 22, 1931; June 12, 1931, committed to the Danvers State Hospital until further order of the court.

Frank Sortini.

Indicted September, 1931, for the murder of Severino Mercurio, *alias*, at Lexington, on Sept. 11, 1931; arraigned Sept. 24, 1931, and pleaded not guilty; trial November, 1931; verdict of not guilty.

John D. Wall, John J. Oliver and Walter Sousa.

Indicted March, 1931, for the murder of Evangelista L. Bagni, at Somerville, on Feb. 24, 1931; arraigned March 19, 1931, and each pleaded not guilty; trial April, 1931; verdict as to each, guilty of murder in the second degree; thereupon sentenced to State Prison for life.

Vito Michael Zarrilli.

Indicted September, 1931, for the murder of Michael J. L. Lancelotta, at Cambridge, on Aug. 31, 1931; arraigned Sept. 18, 1931, and pleaded not guilty; Oct. 22, 1931, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than ten years nor more than fifteen years.

Paul Zaverchenko, *alias*.

Indicted February, 1931, for the murder of Mary Zaverchenko, at Cambridge, on Jan. 15, 1931; arraigned Feb. 5, 1931, and pleaded not guilty; March 3, 1931, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than seven years nor more than ten years.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

James F. Tevlin and William A. Callahan.

Indicted in Plymouth County, February, 1931, for the murder of Riscala G. Khoury, at Brockton, on Sept. 17, 1930; March 27, 1931, *nolle prosequi* as to both, because of insufficient evidence to convict.

Southern District (in charge of District Attorney William C. Crossley).

Louis Ramos.

Indicted in Bristol County, in November, 1931, for the murder of John D. McKinnon; committed to the Bridgewater State Hospital for observation Nov. 16, 1931.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Abraham Goldenberg.

Indicted January, 1931, for the murder of Lillian Franks, on Jan. 9, 1931; arraigned Jan. 22, 1931, and pleaded guilty; March 30, 1931, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

William Paananen.

Indicted June, 1931, for the murder of Marciano Caggiano, on April 15, 1931; June 30, 1931, committed to the Bridgewater State Hospital as insane.

Orrin L. Taylor, *alias*.

Indicted February, 1931, for the murder of Theodore Chychuk, on April 26, 1927; arraigned March 3, 1931, and pleaded not guilty; April 3, 1931, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Michael J. Walsh.

Indicted October, 1931, for the murder of Honora A. Walsh, on Sept. 18, 1931; arraigned Oct. 23, 1931, and pleaded not guilty; Nov. 19, 1931, adjudged insane and committed to the Bridgewater State Hospital.

Western District (in charge of District Attorney Thomas J. Moriarty).

Jesse H. Gilman.

Indicted in Hampden County, September, 1931, for the murder of Carrie Gilman, at Springfield, on June 3, 1931; arraigned Oct. 6, 1931, and pleaded not guilty; Dec. 2, 1931, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Lucjen Ochocki, *alias*.

Indicted in Hampden County, May, 1931, for the murder of Mike Krol, at Westfield, on May 1, 1931; arraigned May 18, 1931, and pleaded not guilty; June 26, 1931, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

3. Pending indictments and status:

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Wilfred F. Dart.

Indicted September, 1931, for the murder of Charles J. Bernard, at Newton, on July 13, 1931; arraigned Sept. 15, 1931, and pleaded not guilty; trial November, 1931; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life; claim of appeal pending.

James T. Garrick and Edward Consalvi.

Indicted May, 1931, for the murder of James M. Kiley, at Somerville, on April 9, 1931; arraigned Oct. 22, 1931, and each pleaded not guilty.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Clarence H. Ellis.

Indicted in Plymouth County, October, 1931, for the murder of Thomas A. Marsland, at Carver, on Oct. 4, 1931; not yet arraigned.

Southern District (in charge of District Attorney William C. Crossley).

William Brown.

Indicted in Bristol County, February, 1919, for the murder of Annie Brown; arraigned Nov. 20, 1931, and pleaded not guilty.

John Canuel and Luke Vaillancourt, *alias*.

Indicted in Bristol County, November, 1931, for the murder of Marie Ann Gauthier; arraigned Nov. 20, 1931, and each pleaded not guilty.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Michelina Filipiak.

Indicted August, 1931, for the murder of Wadislaw Filipiak, on Nov. 28, 1931; arraigned Sept. 11, 1931, and pleaded not guilty.

Samuel Gallo.

Indicted January, 1929, for the murder of Joseph Fantasia on June 11, 1927; arraigned Jan. 11, 1929, and pleaded not guilty; trial February, 1929; verdict of guilty of murder in the first degree; motion for new trial allowed March 22, 1929; second trial September, 1930; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; Oct. 17, 1931, motion for new trial allowed.

Western District (in charge of District Attorney Thomas F. Moriarty).

Joseph Pulara.

Indicted in Berkshire County, July, 1929, for the murder of Lucey Pulara, at Pittsfield, on Jan. 25, 1929; arraigned July 14, 1931, and pleaded not guilty.

John Siano.

Indicted in Hampden County, December, 1922, for the murder of Nicholas Napoli, at East Longmeadow, on Sept. 18, 1922; arraigned Feb. 18, 1931, and pleaded not guilty; Oct. 8, 1931, admitted to bail on own recognizance.

OPINIONS.

Department of Education — Veteran's Child — Reimbursement of Expenses.

Room rent paid by a veteran's child may, under some circumstances, be the subject of reimbursement as an expense of such child as a student, under St. 1930, c. 263.

Dec. 3, 1930.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked me the following question in relation to the provisions of St. 1930, c. 263, which provides reimbursement for various expenses incidental to the higher education of the children of certain veterans: —

"I am writing to inquire if in your opinion we could allow reimbursement towards board in the case of a boy who lives at home."

The applicable sections of said chapter 263 read thus: —

"Section 1. The commonwealth, acting through the department of education, may contribute toward the expenses of the higher education of any child, resident in the commonwealth and not under sixteen years and not over twenty-two years of age, whose father entered the military or naval service of the United States from Massachusetts in the world war and was killed in action or died from other cause as a result of such service, between April sixth, nineteen hundred and seventeen and July second, nineteen hundred and twenty-one.

Section 2. Any child who is eligible under the provisions of the preceding section shall, upon becoming a student in any state or county educational institution or other educational institution approved in writing by the commissioner of education, be entitled to reimbursement by the commonwealth, in an amount not to exceed two hundred and fifty dollars in any year, for expenses for tuition, board and room rent, transportation, books and supplies necessary or incidental to his pursuit of study at any such state or county educational institution and for expenses for the above-named items except tuition in any other educational institution approved as aforesaid. Such reimbursement shall be made to such child, or his guardian if any, on the presentation of vouchers therefor approved by the said commissioner."

I am of the opinion that if the room rent for which reimbursement is considered is such as the child may legally be required to pay and does pay and the rental is actually necessary as an incident to the pursuit of his studies, reimbursement may properly be made.

In each case the Commissioner must find the facts to be substantially as I have stated above before determining that reimbursement is due.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Department of Education — Towns — Transportation of School Children.

The Department of Education has authority to determine the necessity of transportation of a school child to a town other than that of his residence.

The authority to determine how much it shall pay towards the board of a school child in another town is vested in the school committee of the town of residence.

Dec. 4, 1930.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked my opinion upon the following questions, which require an interpretation of G. L., c. 71, § 6, as amended by St. 1930, c. 48. The questions are as follows: —

"1. Does the second sentence of section 6, 'Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at cost up to forty cents for each day of actual attendance, and it may expend more than said amount,' give the Department of Education the right to decide when transportation is necessary?

2. Under the last sentence in the first paragraph of section 6, 'Whenever, in the judgment of the department, it is expedient that such a pupil should board in the town of attendance the town of residence may, through its school committee, pay toward such board, in lieu of transportation, such sum as the said committee may fix,' may the department require the town to pay the same minimum charge as for transportation?

3. Under the amendment to section 6 provided by St. 1930, c. 48, 'If, however, the distance between a pupil's residence and the school he is entitled to attend under this section exceeds three miles, the town may, when necessary, be required by the department to expend for transportation for such pupil a sum up to eighty cents in all for each day of attendance,' can the department require a town to expend for board in lieu of transportation a sum up to eighty cents for each day of attendance?"

G. L., c. 71, § 6, as amended by St. 1930, c. 48, reads as follows: —

"If a town of less than five hundred families or householders, according to such census, does not maintain a public high school offering four years of instruction, it shall pay the tuition of any pupil who resides therein and obtains from its school committee a certificate to attend a high school of another town included in the list of high schools approved for this purpose by the department. Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at cost up to forty cents for each day of actual attendance, and it may expend more than said amount. If, however, the distance between a pupil's residence and the school he is entitled to attend under this section exceeds three miles, the town may, when necessary, be required by the department to expend for transportation for such pupil a sum up to eighty cents in all for each day of attendance. The department shall approve the high schools which may be attended by such pupils, and it may, for this purpose, approve a public high school in an adjoining state. Whenever, in the judgment of the department, it is expedient that such a pupil should board in the town of attendance the town of residence may, through its school committee, pay toward such board, in lieu of transportation, such sum as the said committee may fix.

If the school committee refuses to issue a certificate as aforesaid, application may be made to the department, which, if it finds that the educational needs of the pupil in question are not reasonably provided for, may issue a certificate having the same force and effect as if issued by the said committee. The application shall be filed with the superintendent of schools of the town of residence, and by him transmitted forthwith to the department with a report of the facts relative thereto."

1. The answer to your first question is in the affirmative, provided that the school committee has refused to issue the certificate mentioned in the

first sentence, and provided that application has been made to your department. The second paragraph of section 6, as amended, provides that the department in that case may issue such a certificate having the same force and effect as if issued by the school committee. It would, indeed, be futile to give the department power to issue a certificate without the power to arrange for the transportation of the pupil to the school. The school committee could nullify the certificate by the simple expedient of saying that transportation was not necessary. Surely the Legislature never intended any such incongruous result as that.

If the matter of a certificate to attend a high school in another town is properly before your department, then your department has power under the statute to determine for itself whether or not transportation is necessary.

2. Inasmuch as the statute does not require a minimum charge for transportation, it is difficult to answer your question as worded. The department has power to compel the school committee to spend not more than eighty cents a day for transportation, if the school the pupil is to attend is more than three miles away, which is a maximum sum, not a minimum. If the pupil boards in the town where the school is located, it is the duty of the town to pay towards the board such sum as the school committee, in its discretion, may fix. The town does not pay the whole board; it is only required to pay towards it, and the amount is left to the committee, not to the department. In my opinion, the power of the department ends with deciding that it is expedient that the pupil should board where the school is located.

3. I answer your third question in the negative. If the pupil is living at home, the department can compel the town to spend up to eighty cents a day for transportation; but, as stated in answer to question 2, if the department decides that the pupil should board where the school is located, then it has nothing to say as to the amount the town shall contribute towards the board.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Trackless Trolley Cars — Operators — Registration — License.

Certain trackless trolley cars are required to be registered and their operators licensed, under G. L., c. 90, as amended.

Dec. 4, 1930.

Hon. Frank E. Lyman, *Commissioner of Public Works.*

Dear Sir: — You have written me as follows: —

"The Boston Elevated Railway Company is planning to experiment with so-called 'trackless trolleys,' and in connection with this proposition I would like your opinion on the following question: —

Is a vehicle operated by the system known as 'trolley motor' or 'trackless trolley,' under the authority of G. L., c. 163, a motor vehicle operated in the manner and for the purposes set forth in G. L., c. 159, § 45, and a motor vehicle which must be registered and the operator of which must be licensed under G. L., c. 90?"

The Attorney General does not pass upon questions of fact, but I assume, from information which I have received, that a vehicle which is

used as a trackless trolley car, though it derives its motive power from electricity transmitted by an overhead wire, is of a somewhat different construction from the vehicle commonly known as a trolley car, which is run upon rails. I am of the opinion that such a vehicle, adapted for operation under G. L., c. 163, is a "motor vehicle" within the definition of G. L., c. 90, § 1, as finally amended by St. 1930, c. 332, § 1, which reads as follows: —

" 'Motor vehicle', automobiles, semi-trailer units, motor cycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks."

A trackless trolley car is not explicitly within the enumerated exceptions of those motor vehicles which are not included within the definition of "motor vehicles" as used in said chapter 90. It is not, upon the factual assumption which I am constrained to make, a "railway" car, as that word is commonly used. It is treated as something different therefrom in the language of the legislative enactments relative to "trackless trolley-motor" or "trackless trolley" systems. The provisions of G. L., c. 163, concerning trackless trolley companies have in substance been in existence since 1916, and at no time has the Legislature in framing definitions of the words "motor vehicles" specifically indicated any intention to exclude trackless trolley cars from the scope of such definitions. That trackless trolley cars may be operated by street railway companies does not, in my opinion, make them "railway cars," as those words are used in the definition of "motor vehicles" in G. L., c. 90, § 1, as amended.

G. L., c. 163, "Trackless Trolley Companies," in its applicable portion, reads as follows: —

"Section 2. Any corporation organized as provided in this chapter, and any domestic street railway company may, as hereinafter provided, transport for hire passengers . . . by the system known as trolleymotor or trackless trolley, and may build, equip, operate and maintain vehicles for such transportation, . . . and the authorities having jurisdiction over such public ways may grant permits for the operation of the said vehicles over such ways, and for the erection of poles, wires and other necessary structures within, over or under such public ways in the manner and to the extent provided by law for the granting of locations to street railway companies."

Section 6 contains provisions relative to the securing of permits for operation in the public ways by companies operating trackless trolleys. Such trackless trolleys, being motor vehicles, may, under certain circumstances, fall within the provisions of G. L., c. 159, § 45, as amended, and its provisions applicable to licenses and permits must then be read in connection with the terms of G. L., c. 163, § 6, relative to the same subject, so that as far as possible their context may make an harmonious whole.

It is apparent from the foregoing considerations which I have set forth that trackless trolley cars are to be registered and their operators licensed under G. L., c. 90, as amended.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Massachusetts Industrial Commission — Expenses — Advertising.

The Massachusetts Industrial Commission has no authority to expend money for advertising space.

Dec. 16, 1930.

Hon. E. Leroy Sweetser, *Commissioner of Labor and Industries.*

Dear Sir: — You have asked my opinion upon the following question: —

"A question has arisen as to whether, under St. 1929, c. 357, the statute by which the Massachusetts Industrial Commission was established and its duties defined, the Commission has authority to enter into contracts involving the expenditure of public funds for the purchase of advertising space, except as such space may be represented by books, maps, charts and pamphlets which it seems especially authorized to prepare, print and distribute.

Under the statute would the Commission be empowered to make expenditures for advertising space in newspapers or magazines?"

The applicable portions of St. 1929, c. 357, establishing the said Commission, read: —

"*Section 9A.* There shall be in the department a commission for the promotion and development of the industries and industrial, agricultural and recreational resources of the commonwealth, to be known as the Massachusetts industrial commission, in this and the two following sections called the commission. . . .

. . . . . .

Section 9C. The commission may conduct researches into industrial and agricultural conditions within the commonwealth, and shall seek to co-ordinate the activities of unofficial bodies organized for the promotion of the industrial, agricultural and recreational interests in the commonwealth, and may prepare, print and distribute books, maps, charts and pamphlets which in its judgment will further the purpose for which it is created, and, on behalf of the commonwealth, may accept contributions and, subject to the approval of the governor and council, may expend the same and also may expend such sums as may be appropriated by the general court to carry out the purpose of this and the two preceding sections."

In my opinion, the Legislature has not indicated in said chapter 357 an intent to authorize the said Commission to expend the public funds for "advertising space in newspapers or magazines," or to make contracts looking towards such expenditure. The words of the statute empowering the Commission to "prepare, print and distribute books, maps, charts and pamphlets" do not appear to me to be susceptible of an interpretation which would include authority to pay for "advertising space," as those words are ordinarily used.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Boiler Inspection — Certificate — Revocation.

Lapse of time will not bar the exercise of the power to revoke a certificate of competency to inspect boilers if the holder made a wilfully false statement in his application for such certificate.

Dec. 16, 1930.

Gen. A. F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You have asked my opinion as to whether or not a certificate of competency to inspect boilers may be revoked, after nine years from the date of its being given, by reason of untrue statements made by the holder upon his application for such certificate.

G. L., c. 146, § 59, reads as follows: —

"A certificate of competency to inspect boilers shall be revoked and a license as engineer or fireman or operator of hoisting machinery shall be suspended or revoked for incompetence or untrustworthiness of the holder thereof. *A wilfully false statement in the application shall be sufficient cause for revocation at any time.* If a certificate or license is lost or destroyed a new certificate shall be issued without examination upon satisfactory proof thereof."

To warrant revocation of said certificate for the reason set forth in your letter it must appear that the application contained a statement which was in fact "false" and which was also "wilfully" made by the applicant. The statute specifically states that such a statement "shall be sufficient cause for revocation at any time." There appears to be no other legislative enactment which controls or limits the phrase "at any time" as used in said section 59, nor any "statute of limitations," such as is mentioned in your letter, which prevents the exercise of the authority to revoke for the cause referred to after the passage of nine years.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Department of Education — Transportation — Residence of School Child.

Under G. L., c. 71, § 68, a municipality cannot be required to transport to school children residing upon land ceded to the United States.

Dec. 26, 1930.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked my opinion as to whether the city of Gloucester may be required by your department to furnish transportation to school, under the provisions of G. L., c. 71, § 68, for the children of the keeper of the Eastern Point light station, who reside at such station.

You have advised me that the distance from the children's residence to the public school in Gloucester, which the children would attend, is more than two miles. It is plain from the applicable language of G. L., c. 71, § 68, which is as follows: —

"Every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools. If the distance between a child's residence and the school he is entitled to attend exceeds two miles, and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child,

may require the town to furnish the same for a part or for all of the distance."

that, under ordinary circumstances, your department would have the right to require such transportation. You direct my attention particularly to the fact that the children's place of residence is upon land of the United States, which I am informed is used for lighthouse purposes by the Federal government and was purchased in fee from the owner by the United States in 1829. Jurisdiction of said land was ceded to the United States by St. 1831, c. 45, and by R. S. (1836), c. 1, § 2. The language used by the Legislature in ceding jurisdiction is such as to vest jurisdiction in the United States as long as the land is used for the purpose of keeping a lighthouse or erecting a monument thereon, with concurrent jurisdiction reserved to the Commonwealth only for the service of civil and criminal process.

The reservation of concurrent jurisdiction in the Commonwealth being no greater, it is plain from the language of the Supreme Judicial Court in *Opinion of the Justices*, 1 Met. 580, as that is supplemented by the comments thereon contained in the opinion in *Newcomb* v. *Rockport*, 183 Mass. 74, that the municipality in question is not required under the existing circumstances to provide school facilities for these particular children. It follows that the municipality cannot be required by your department to furnish transportation for them. See VI Op. Atty. Gen. 593.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Federal Prohibition Act — State Police Officers — Arrest without a Warrant.

State police officers, as such, have no authority to arrest without a warrant persons violating any provision of the Federal Prohibition Act.

Upon the repeal of the "Baby Volstead Act," so called, no authority is derived from G. L., c. 138, § 75, as amended, to arrest without a warrant for transporting, distributing or delivering alcoholic beverages.

DEC. 29, 1930.

Gen. A. F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — I am in receipt of a request for an opinion as to the powers of State police officers in the enforcement of certain laws relating to the liquor traffic.

I.

You ask first whether the words "police officer or constable, in his city or town," contained in G. L., c. 138, § 75, as amended by St. 1923, c. 435, are to be construed as including members of the State police "so as to allow the said State police officers the use of this chapter in the prosecution of offenders thereof."

G. L., c. 138, § 75, as amended, reads as follows: —

"A mayor, alderman, selectman, deputy sheriff, chief of police, deputy chief of police, city marshal, deputy or assistant marshal, police officer or constable, in his city or town, or, in the county of Dukes or Nantucket, the sheriff anywhere within his county, may without a warrant arrest any person whom he finds in the act of illegally selling, transporting, distributing or delivering intoxicating liquor, and seize the liquor, vessels and implements of sale in the possession of such person, and detain them until warrants can be procured against such person, and for the seizure of said liquor,

vessels and implements, under this chapter. Such officers shall enforce or cause to be enforced the penalties provided by law against every person who is guilty of a violation of any law relative to the sale of intoxicating liquor of which they can obtain reasonable proof."

Although the phrase "in his city or town" might seem to limit the meaning of the preceding words to police officers or constables of the various cities or towns, it should be noted that this phrase first appeared in the earlier form of the statute in 1855 (St. 1855, c. 215, § 13), before the creation of the State police. It is now provided by G. L., c. 147, § 2, that —

"The state police shall have and exercise throughout the commonwealth the powers of constables, except as to service of civil process, and of police officers."

I am accordingly of the opinion that State police officers have and may exercise the same powers as, by G. L., c. 138, § 75, as amended, are given to police officers and constables.

The form of your first question, however, indicates some misunderstanding as to the full effect of this section 75, which constrains me to point out that the section itself creates no offense.

Section 75 has existed in this exact form since 1904, at least save for the amendment of St. 1923, c. 435, which extended the exercise of the powers therein bestowed to the sheriffs of Dukes and Nantucket Counties. The section bestowed powers and imposed duties. The particular powers which were bestowed upon the public officials therein named were the powers of arrest without a warrant, of seizure of liquor, vessels and implements of illegal sale, and of detention thereof until warrants could be procured. Any of such officials were therein authorized to exercise the power — namely, to arrest without a warrant — upon finding any person in the act of illegal sale, transportation, distribution or delivery of intoxicating liquor. The duties imposed upon them were those of enforcing and causing to be enforced penalties provided by law against persons guilty of violation of any law relative to *sale* of intoxicating liquor. The section did not constitute as illegal the selling, transporting, distributing or delivering of intoxicating liquor. It merely granted powers to enable proceedings against persons committing acts pertinent to acts which had been or were to be made illegal by other State laws. As pointed out, this law has existed in practically the same form for twenty-six years, fifteen of which were before the adoption of the Eighteenth Amendment. It particularly related, therefore, to such sale, transportation, distribution and delivery of intoxicating liquors as were then or should thereafter by State law be made illegal. The fact that the power to seize was confined to seizure of implements for *sale* indicates that the acts of transportation, distribution and delivery of liquors so recited, and for which power to arrest without a warrant persons found performing such acts was bestowed, related to transportation, distribution and delivery of liquors intended for illegal sale. The particular transportation alluded to was that which was an offense under R. L., c. 100, § 48. This section provided that —

"No person shall bring any spirituous or intoxicating liquor into a city or town in which licenses . . . are not granted, with intent to sell it himself or to have it sold by another, or having reasonable cause to believe that it is intended to be sold in violation of law; . . ."

The recital of the acts of "transporting, distributing or delivering" intoxicating liquor, in said G. L., c. 138, § 75, is a continuation of like recital in the law forerunning section 75 (R. L., c. 100, § 86), wherein such recital was intended to be applied to effect the enforcement of said R. L., c. 100, § 48, in the protection of no-license communities from the introduction of intoxicating liquors contrary to law. Section 48, however, was repealed by the recodification of the law in 1921, by G. L., c. 282, though the recodification retained the particular recital in section 75 of chapter 138. No other law was thereafter in existence prior to December, 1924, specifically prohibiting the transportation of intoxicating liquors.

It is to be noted that G. L., c. 138, § 75, contemplates that, on arrest without a warrant of any person found in the act of illegally selling, transporting, distributing or delivering intoxicating liquor and seizure of liquor, vessels and implements of sale, there be detention "until warrants can be procured against such person, and for the seizure of said liquor, vessels and implements, *under this chapter*" (italics mine). As there is now no State law prohibiting transportation, it is obvious that no warrant therefor can be procured "under this chapter," namely, G. L., c. 138. Consequently, upon an arrest or seizure for such act a State police officer would be unable thereafter to procure a warrant, and would be a trespasser. See *Kent* v. *Willey*, 11 Gray, 368 (1858).

In December, 1924, G. L., c. 138, § 2A (the "Baby Volstead Act"), became effective. It created new offenses, namely, the acts of manufacturing, transporting, importing and exporting intoxicating liquor without a Federal permit. This law has now been repealed, and these acts are no longer offenses under the State law. Whether or not the creation of the offense of transporting as one of the offenses recited in this law enlarged the words "transporting, distributing or delivering intoxicating liquor *for illegal sale*," in G. L., c. 138, § 75, during the life of the law, so as to include transportation of liquor without a Federal permit and irrespective of its purpose, the situation today with respect to the powers of arrest without a warrant, seizure of implements for sale, and detention of implements until issuance of warrants, and with respect to the exercise of such powers as to persons found in the act of illegal sale, transportation or delivery of liquor for sale, under G. L., c. 138, § 75, as amended, is as it was after the repeal of R. L., c. 100, § 48, and prior to the effective date of the so-called "Baby Volstead Act."

Therefore, since the only specific act of those named in the clause of section 75 authorizing action without a warrant which is now an offense against the laws of this Commonwealth is that of illegally selling intoxicating liquor, the only powers which may be exercised by the State police under said clause pertain to said act, and are, namely, those of arresting without a warrant any person found in the act of selling intoxicating liquor illegally (that is, in violation of section 2 of said chapter 138), of seizing the liquor, vessels and implements of sale in the possession of such person, and of detaining them "until warrants can be procured against such person, and for the seizure of said liquor, vessels and implements, under this chapter." Furthermore, that it was the legislative intent to confine the powers recited in section 75 to the enforcement of the laws *of this Commonwealth* is apparent from the provision that the officer arresting and seizing thereunder shall detain the objects of the arrest and seizure until warrants can be procured "under this chapter." Consequently, it is my opinion that the word "illegally" in the fourth line of section 75 is to be construed as meaning "illegally by the laws of this Commonwealth."

The scope of the section has not been enlarged by reason of the enactment of Federal laws relative to sale of intoxicating liquor so as to include cases of sale in violation of Federal law, by the provision that "Such officers shall enforce or cause to be enforced the penalties provided by law against every person who is guilty of a violation of any law relative to the sale of intoxicating liquor of which they can obtain reasonable proof." This one of the several provisions in section 75 was enacted first in substantially the same form in St. 1876, c. 162, § 14, and took the place of the provision of St. 1869, c. 415, § 57, which read: "The several officers aforesaid shall enforce or cause to be enforced the penalties *provided in this chapter*, against every person guilty of any violation thereof of which they can obtain reasonable proof." St. 1869, c. 415, which confined enforcement of penalties to those provided therein, was by St. 1876, c. 162, extended to enforcement of penalties for violations provided or to be provided in other chapters. It is to be noted again that the violations of law, for the enforcement of penalties for which the duties were imposed, were confined to those of any law relative to sale, and that consequently violation of Federal laws relating to aspects or forms of liquor traffic other than sale are excluded at once from argument. It is my opinion that, just as the quoted provisions of the act of 1869 and of the act of 1876 referred only to enforcement of penalties for violations of laws of this Commonwealth, so this provision now embodied in section 75 is confined to cases of such violations and to violations of State law relating to sale, and is therefore not to be construed as conveying power or authority to enforce any Federal statute relating to liquor traffic.

II.

Your second question is as to "what is the power of a State police officer, under the Federal Constitution, who in the course of his duty either on the highway or in a raid comes upon a load of liquor in a vehicle or a liquor manufacturing still?"

A. I shall assume that you wish to know of all powers vested in the State police in such circumstances, from whatever authority they may arise, and shall treat the question first in its aspect of involving violations of the National Prohibition Act.

(1) As to what powers are given by the terms of the National Prohibition Act itself, I would refer you to an opinion rendered August 14, 1924 (VII Op. Atty. Gen. 506), by one of my predecessors in office, Honorable Jay R. Benton, to the then Commissioner of Public Safety, with the reasoning and conclusion of which I concur. This opinion reads, in part, as follows: —

"You request my opinion whether under section 26 of the Volstead Act, so called, members of the State police are given authority to seize vehicles in which intoxicating liquors are being transported and to arrest the person in charge thereof.

The Act of October 28, 1919, c. 85, title II, § 26, called the 'National Prohibition Act,' provides, in part, as follows: —

'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air

or water craft, or any other conveyance, and shall arrest any person in charge thereof. . . .'"

And on page 508: —

"It . . . seems to me that Congress by the use of the words 'any officer of the law,' in section 26 of the act, conferred power only on Federal officers and did not authorize State officers to act thereunder. . . .

I am accordingly of the opinion that members of the State police, as such, have no authority or power to act under the National Prohibition Act. The police, however, are private citizens also, and, as such, may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens."

The Supreme Court of the United States, in *Gambino* v. *United States*, 275 U. S. 310 (1927), likewise arrived at the conclusion that the term "any officer of the law," used in section 26 of the National Prohibition Act, referred only to Federal officers, thus settling that question conclusively. No other provision of the National Prohibition Act purports to confer authority on State police officers, so that State police officers, as such, are not given any authority by the terms of the National Prohibition Act.

There should not be lost sight, however, of the terms of U. S. Rev. Stat., § 1014, which are incorporated into the National Prohibition Act by section 2 thereof, and which empower certain State officials to issue process for the apprehension of offenders against the laws of the United States. This statute reads: —

"For any crime or offense against the United States, the offender may, by any . . . judge of a supreme or superior court, . . . mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, . . . be arrested and imprisoned, . . . for trial before such court of the United States as by law has cognizance of the offense."

It has been decided in *Goulis* v. *Judge of District Court*, 246 Mass. 1 (1923), that a State magistrate is not required to act under these provisions, but may act at his option, and cause an arrest to be made according to the methods usually employed in this Commonwealth. Likewise it was said in VII Op. Atty. Gen. 506, 507: —

"It is well established that while Congress may confer power upon State officers, which the latter *may* exercise or not in their discretion, unless prohibited by State legislation, Congress cannot lawfully compel them to act. . . . Even if the statute specifically empowered members of the State police to act, they could refrain from exercising the powers so granted if they so desired."

A State police officer has, then, such power as he may derive from any process which may issue under U. S. Rev. Stat., § 1014. The procedure, involving, even supposing the magistrate chooses to act, the making of a complaint, the issuance of a warrant thereon, and then a hearing to determine whether there is just cause for holding the accused for trial before the Federal court, would not be effective in most cases of transportation, owing to the time necessarily consumed in following it. But any power of a State police officer with relation to violations of the National Prohibition Act other than that derived from process issued under U. S. Rev. Stat., § 1014, just referred to, must find source, if at all, outside the terms of the act itself.

(2) Since the rendering of the opinion of the former Attorney General referred to above and of the decision in *Gambino* v. *United States, supra,* the character of certain violations of the National Prohibition Act has been changed by an act of Congress which constitutes them felonies. This act of Congress (Act of March 2, 1929, c. 473; 45 Stat. at L., Pt. 1, 1446), otherwise known as the Jones Act, reads as follows: —

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.

Sec. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act."

U. S. Comp. Stat. (1918), § 10509, provides: —

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies."

Thus, the manufacture, sale, transportation, importation and exportation of intoxicating liquor in violation of the National Prohibition Act now constitute felonies under the laws of the United States.

Mass. G. L., c. 274, § 1, defines "felony" in the following terms: —

"A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors."

Mass. G. L., c. 125, § 11, provides that the State Prison shall be the —

"general penitentiary and prison of the commonwealth where all male persons convicted of crime in a court of the commonwealth or in any court of the United States and sentenced by them according to law to solitary imprisonment and confinement in the state prison at hard labor shall be securely confined and employed at hard labor; . . ."

This section, first enacted by St. 1805, c. 113, existed in substantially the same form when St. 1852, c. 37 (now G. L., c. 274, § 1), was passed, and it might at first glance appear that the Legislature in enacting the latter statute intended to include within the definition of "felony" certain crimes against the United States.

The provisions of Mass. G. L., c. 274, § 1, were first enacted by St. 1852, c. 37, in pursuance of an order of the Senate directing the Committee on the Judiciary "to consider the expediency of defining 'felony' by statute." Previously, in June, 1851, one Stephen Carey had been tried in Cambridge for the murder of a station-house keeper, who was also a peace officer, whom Carey, in resisting arrest by him, had killed. Whether the killing amounted to murder or only to manslaughter depended upon whether the arrest was lawful or unlawful, and the court stated the common-law rule that the arrest would not have been lawful unless the crime proved or suspected were a felony. In the opinion of the court, found in 12 Cush. 246, Shaw, C.J., said (p. 252): —

"This is the old established rule of the common law, adopted and acted upon in this commonwealth, by which courts of justice are bound to be governed, until altered by the legislature; that anciently there was a broad and marked distinction between felony and misdemeanor, the former being attended at common law with forfeiture of all the offender's goods; that by the statutes of this commonwealth, and especially by the revised statutes, the line of distinction between felonies and misdemeanors was in a great measure obliterated, and in many instances the law regarded as misdemeanors offences of a greater moral turpitude than many felonies, yet it had not changed the rule in question; though perhaps it might be more wise in the legislature to make the rule in question applicable to offences measured by a different standard of aggravation, as by being punishable in the state prison, or otherwise."

In pursuance of the Senate order above referred to, the Committee on the Judiciary on February 3, 1852, filed the following report: —

"Felony, according to the common law, is defined, any offence which occasions a forfeiture of lands or goods. As such a forfeiture never takes place in this Commonwealth, the only way in which we can determine whether an offence is a felony or not, is by ascertaining whether the law of England made it so. The question is not a merely speculative one, because the right of officers and private persons to make arrests without warrant can only be determined by deciding whether the crime committed was a felony. This is often a question of great practical importance. And as some offences not now felonious, are intrinsically more criminal than others which are, and as few officers have any means of judging, in many cases which actually occur, what is the legal character of the act committed, it seems important that a definition be given as a guide to them and others. In a recent trial for murder, in Middlesex County, the question, whether the prisoner's offence was murder or manslaughter, depended entirely on the decision of the question, whether the act which he was suspected of having committed was a felony or not, and consequently whether the officer whom he killed, was justified in attempting to arrest him without a warrant.

Your committee, therefore, report the accompanying bill, which defines the word '*felony*' in such a manner, that every one can understand it.

S. E. Sewall,
For the Committee.

An Act to define 'Felony.'

Be it enacted, etc., as follows:

Any crime which now is or hereafter may be punishable by death, or imprisonment in the state prison, shall be considered felony; and no other crime shall be so considered."

The act recommended by the report was approved in substantially the same form on March 15, 1852, as section 1 of St. 1852, c. 37.

As appears from the report of the Committee on the Judiciary quoted above, the committee and the General Court in considering and enacting St. 1852, c. 37, were clearly confronted with the significance of the statute in its relation to the right to arrest without a warrant; and although the legislation arose from the need, then made evident, of clarifying the basis of justification for arrest without a warrant, it is nevertheless my opinion

that the General Court attempted to bring about such a clarification only in so far as such justification might rest upon the felonious character of a crime as imposed by the laws of this Commonwealth, and only by defining the limits of felony by the law of this Commonwealth. The General Court did not attempt to impose a felonious quality upon offenses against the United States, as such, or to adopt any classification of crimes which might be employed by the Congress, so that the mere fact that an offender against a Federal law may be incarcerated in our State Prison does not render his crime a felony by the law of this Commonwealth. In this view of the scope of the statute it is not necessary for me to consider whether such an adoption would have been unconstitutional as to acts subsequently made felonies by Federal enactment. See *Opinion of the Justices*, 239 Mass. 606 (1921).

By common law a private person is justified in arresting for a felony without a warrant, but only in cases of the actual guilt of the party arrested. *Rohan* v. *Sawin*, 5 Cush. 281 (1849). "But as to constables, and other peace-officers, acting officially, the law clothes them with greater authority, and they are held to be justified, if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony," even although it afterwards appear that no felony has been committed. *Rohan* v. *Sawin*, *supra*, and cases cited; *Commonwealth* v. *Carey*, 12 Cush. 246, 251 (1853).

The greater protection afforded to officers of the law in the premises is said in 2 Hale, P.C., page 85, to be given —

"1. Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this.

2. Because that they are by law punishable, if they neglect their duty in it."

Thus, this wider protection cloaks and justifies peace officers in the performance of the duties resting upon them as such officers — duties for the non-performance of which they would be punishable as derelict — or, in the words of the court in *Rohan* v. *Sawin*, *supra*, they are clothed with the greater authority when "acting officially." If no such duty exists, then, even assuming without discussion that the rule justifying arrest without a warrant for a felony may include Federal felonies, a State police officer in arresting without a warrant for a violation of the National Prohibition Act would not be "acting officially," and so would be acting without the justification of any power vested in him as a peace officer. I have already stated that no authority is vested in State police officers, as such, by the National Prohibition Act, and have quoted with approval from VII Op. Atty. Gen. 506, 507, the opinion that Congress cannot, even if it attempt to do so, lawfully compel State officers to act.

Therefore, State police officers would rest under such a duty as to give rise to the wider protection given to peace officers only if such duty were imposed upon them by some law, common or statutory, of this Commonwealth. I find no statute or decision in this Commonwealth clearly importing such a duty, and believe that the interference with personal liberty and deprivation of property which it would import is not to be lightly found by implication. It is therefore my opinion that whatever may be the powers or duties of private citizens in the premises, or of State police officers in their capacity as private citizens, it is no part of the official duties of the State police officers of this Commonwealth without a warrant to arrest a person or to search for or to seize any of his property

upon reasonable or probable grounds to believe that such person has sold, transported, imported or exported intoxicating liquor, or is in the process of committing any of these acts, in violation of the National Prohibition Act. To be sure, among the oaths administered to every State police officer for qualification is an oath to support the Constitution of the United States. This oath is administered in the same form to every officer of the Commonwealth, and does not of itself impose a duty to enforce a Federal enactment, such as the National Prohibition Act, which itself authorizes only Federal officers to act thereunder.

B. I come now to a consideration of that aspect of your second question which involves possible violations of the laws of this Commonwealth. I have pointed out that Mass. G. L., c. 138, § 75, does not prohibit *per se* the transportation of alcoholic beverages, and that R. L., c. 100, § 48, forbidding introduction of intoxicating liquor into no-license cities and towns, was repealed. On November 2, 1920, after the National Prohibition Act went into effect, there was approved by the people an act which had been proposed by initiative petition, namely, St. 1920, c. 630, which created a class of certain non-intoxicating beverages. These beverages were defined as those containing not less than one-half of one per cent nor more than two and three-fourths per cent of alcohol, and their sale, without license, was prohibited. See Mass. G. L., c. 138, § 2, which reads as follows: —

"No person shall sell, or expose or keep for sale, spirituous or intoxicating liquor or certain non-intoxicating beverages, except as authorized by this chapter."

Section 10 of St. 1920, c. 630, authorized the granting of licenses for the sale of these "certain non-intoxicating beverages" by cities and towns which had voted to grant such licenses, and directed the aldermen or selectmen to cause an annual vote to be taken upon the question of license. By St. 1925, c. 33, the Legislature provided that all provisions requiring aldermen or selectmen to cause a vote to be taken upon the question of license should cease to be in effect during such period as the sale of certain non-intoxicating beverages should be in violation of Federal law. All other provisions regarding the issuance of licenses for the sale of beverages containing not less than one-half of one per cent nor more than two and three-fourths per cent were left intact; and it is my opinion that these remaining provisions do not permit—because they cannot permit—a sale of any beverage containing more than one-half of one per cent of alcohol in this Commonwealth. See *National Prohibition Cases*, 253 U. S. 350 (1920).

The sections of Mass. G. L., c. 138, however, which provide for the enforcement of section 2 relate only to cases of spirituous or intoxicating liquors; that is, beverages containing more than two and three-fourths per cent of alcohol. Section 59 provides that "the delivery of intoxicating liquor in or from a building" shall, in certain circumstances, be prima facie evidence that such delivery is a sale. Section 61 provides for the issuance of a search warrant upon a complaint that there is belief and reason to believe that spirituous or intoxicating liquor is being kept for sale, and for the search under such warrant and the seizure of "such liquor, the vessels in which it is contained and all implements of sale and furniture used or kept and provided to be used in the illegal keeping or sale of such liquor." Likewise, section 81 of chapter 138, section 14 of

chapter 139 and the other provisions of law relating to nuisances refer only to intoxicating liquors; that is, with a content of more than two and three-fourths per cent of alcohol, and when sold or exposed or kept for sale.

On December 4, 1924, there became law an additional statute, known popularly as the "Baby Volstead Act," which had been approved on May 9, 1923, but was suspended in operation by the filing of two referendum petitions. This law (Mass. G. L., c. 138, § 2A) read as follows: —

"No person shall manufacture, transport by air craft, water craft or vehicle, import or export spirituous or intoxicating liquor as defined by section three, or certain non-intoxicating beverages as defined by section one, unless in each instance he shall have obtained the permit or other authority required therefor by the laws of the United States and the regulations made thereunder."

Thus, in addition to the provisions already existing prohibiting the sale and the exposing or keeping for sale of all beverages containing more than one-half of one per cent of alcohol, the further acts of manufacture, transportation, importation or exportation of such beverages, regardless of whether accompanied by a sale or by an intention to sell, were made unlawful by the laws of this Commonwealth.

On December 4, 1930, in accordance with the will of the people as expressed at the last election, the "Baby Volstead Act" ceased to be of effect. No other section of our laws in relation to alcoholic beverages was at that time voted on, however, so that from December 4, 1930, the statutory situation has been and is substantially the same as before the effective date of the section which then became inoperative.

From the foregoing it is clear that State police officers have power under our laws to act in certain cases wherein they come "upon a load of liquor in a vehicle or in a liquor manufacturing still," since any sale or exposing or keeping for sale of intoxicating liquors is still illegal just as it was before the passage and during the effectiveness of the "Baby Volstead Act."

G. L., c. 138, § 61, to which I have already referred, provides that upon due complaint that "spirituous or intoxicating liquor . . . is kept or deposited . . . in a store, shop, warehouse, building, vehicle, steamboat, vessel or place, and is intended for sale contrary to law," a warrant may issue, if there is probable cause, authorizing a search for and a seizure of "such liquor, the vessels in which it is contained and all implements of sale and furniture used or kept and provided to be used in the illegal keeping or sale of such liquor."

Commonwealth v. *Certain Intoxicating Liquors*, 253 Mass. 581 (1925), arose upon a complaint alleging the keeping of certain intoxicating liquors, that is, beverages containing more than two and three-fourths per cent of alcohol, for sale. A search warrant issued and certain liquors were seized, "together with the vessels containing them, a Reo truck as an implement of sale or container, and certain other articles." The jury found that the truck was used, kept or provided to be used as an implement of sale or a container in the illegal keeping or sale of said liquors. The Supreme Judicial Court, remarking that the evidence before the jury was not before it, said that it was unable to say that the evidence did not justify the finding.

Commonwealth v. *Certain Intoxicating Liquors*, 258 Mass. 85 (1927), arose upon a complaint for the forfeiture of four gallons of liquor "in four metal containers and vehicle to wit: Ford automobile . . ." The Su-

preme Judicial Court held that the evidence was insufficient to warrant a forfeiture, but said (p. 87): —

"Circumstances may exist which would render an automobile liable to forfeiture under our statutes."

And, on page 88: —

"Such transportation may often, perhaps usually, accompany the intent to sell the liquor contrary to law. It is conceivable that such transportation may not be accompanied by a purpose to sell the intoxicating liquor contrary to law, although as a practical matter it may be of infrequent occurrence. But there may be such instances. See *Street* v. *Lincoln Safe Deposit Co.* 254 U. S. 88, 98, and *Corneli* v. *Moore*, 257 U. S. 491, 497. Doubtless slight evidence of intent to sell might be enough, in conjunction with illegal transportation of intoxicating liquor, to prove an intent to sell it contrary to law. 'The place, time and circumstances, and the mode in which it is kept,' together with other relevant facts touching the transaction, well might afford proof of such intent. *Fisher* v. *McGirr*, 1 Gray, 1, 38, 39. The adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of various statutes to enforce the same may give to simple possession of intoxicating liquor and to transportation of it contrary to law, in connection with other circumstances, a different and more sinister significance in connection with prosecutions for crime under such laws than theretofore."

It is thus settled that in some cases an automobile or vehicle containing liquor may be searched and forfeited upon a warrant duly issued, although in the absence of further decided cases upon this point it cannot be said with certainty just what facts will support such a forfeiture.

To summarize my conclusions: State police officers have no authority by virtue of the terms of the National Prohibition Act to enforce its provisions, nor have State police officers, as such, any power at common law to arrest without a warrant for any violations of the National Prohibition Act, even such violations as were constituted felonies by the Jones Act. Certain State magistrates may, however, if they choose, issue process for the apprehension of violators of any Federal act, and State police officers have, of course, the powers derived from such process.

The powers, then, as such, of a State police officer, who, in the language of your question, "in the course of his duty either on the highway or in a raid comes upon a load of liquor in a vehicle . . ." are —

1. If there is transportation or possession, such powers as he may derive from any warrant issued in accordance with the provisions of U. S. Rev. Stat., § 1014, for a violation of the National Prohibition Act.

2. If there is exposing or keeping for sale and the liquor contains more than two and three-fourths per cent of alcohol, to apply for a warrant under Mass. G. L., c. 138, § 61, for a violation of section 2 of the same chapter.

There is no authority, by virtue of his office, to arrest without a warrant in any of the foregoing circumstances.

You ask also what are the powers of a State police officer who "in a raid comes upon a load of liquor in . . . a liquor manufacturing still." You do not state the occasion or authority for the raid, but, assuming that such officer lawfully comes to where he finds liquor in a still, his powers are —

1. If there is possession or manufacture, such as he may derive from

any warrant issued in accordance with the provisions of U. S. Rev. Stat., § 1014, for a violation of the National Prohibition Act.

2. If there is exposing or keeping for sale and the liquor contains more than two and three-fourths per cent of alcohol, to apply for a warrant under Mass. G. L., c. 138, § 61, for a violation of section 2 of the same chapter.

3. If he then find a person in the act of selling liquor in violation of Mass. G. L., c. 138, § 2, to arrest and seize without a warrant and proceed in accordance with the provisions of Mass. G. L., c. 138, § 75.

I might suggest, also, the possible application of our laws relating to nuisances, as to which I believe you are familiar (Mass. G. L., c. 138, §§ 81 and 82; c. 139, §§ 14–20, inclusive).

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Pensions — Prison Employees — "Injury."

As used in G. L., c. 32, § 46, as amended, the word "injury" is limited to an injury caused by external force.

DEC. 29, 1930.

HON. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — You have asked my opinion as to the proper interpretation to be put upon G. L., c. 32, § 46, as amended, which provides for the pensioning of prison employees. You have informed me that, as Chairman of the Commission on Administration and Finance or in your capacity as Budget Commissioner, you have actual duties relative to the particular instance of a contemplated pension which you lay before me, as to which you are immediately required to take official action, and that my advice is essential to enable you correctly to perform such actual duties in the premises. Assuming this to be so, I am rendering you my opinion for your guidance.

The particular point involved in your request is as to the precise meaning of the word "injuries" in the phrase "permanently disabled by injuries sustained in the performance of his duty," as used in said section 46, as amended, which reads as follows: —

"The commissioner of correction may, with the approval of the governor and council, retire from active service and place upon a pension roll any officer of a state prison, the Massachusetts reformatory, the prison camp and hospital, the state farm, the reformatory for women or any jail or house of correction, or any person employed to instruct the prisoners in any prison or reformatory, as provided in section fifty-two of chapter one hundred and twenty-seven, or any other employee of the state prison, the Massachusetts reformatory or the prison camp and hospital, who has attained the age of sixty-five and who has been employed in prison service in the commonwealth, with a good record, for not less than twenty years; *or who, without fault of his own, has become permanently disabled by injuries sustained in the performance of his duty;* or who has performed faithful prison service for not less than thirty years; provided, that no officer of any jail or house of correction shall so be retired except upon the recommendation of the sheriff and county commissioners of the county, except in the county of Suffolk, where the recommendation as to the

officers of the jail shall be made by the sheriff and the mayor of Boston, and, as to the officers of the house of correction, by the institutions commissioners and the mayor of Boston; and provided, that no such officer, instructor or employee shall be retired unless he began employment as such in one of the above named institutions, or as an officer or instructor in one of those named in the following section, on or before June seventh, nineteen hundred and eleven. The word 'officer', as used in this and the two following sections, shall extend to and include prison officer, correction officer and matron."

The facts in the instant case upon which you inform me that you are required to act, as I understand them, are as follows: A prison officer has reached the age of sixty-one and has completed twenty-seven years of service — thus, under section 46, not being entitled to a pension unless he is permanently disabled by injuries sustained in the performance of his duties. As to this, his physicians state that he is permanently disabled from service but that his condition has been "precipitated by the constant and continued nervous strain of his duties at the reformatory." The question which you are considering, then, is: Is this nervous condition an "injury," within the terms of said section 46?

In my opinion, the word "injuries," as employed in said section 46, cannot be interpreted to include such a disorder as you have specified. The Legislature, in G. L., c. 32, has laid down a comprehensive system of pensions for the various classes of employees in the service of the Commonwealth or its subdivisions, with varying requirements as to each class. Thus, for example, under section 43 school-teachers of any city or town other than Boston may be pensioned if they are incapacitated for useful service and have been in the service for twenty-five years. Under section 44 school janitors must have reached the age of sixty and have given twenty-five years of service, and must be physically incapacitated. Under sections 49 to 53, inclusive, veterans of the civil war need only be incapacitated for active duty, with varying qualifications as to prior service. The same is true as to veterans of the Spanish and world wars, under sections 56 to 58. Justices of the Supreme Judicial and Superior Courts must have given fifteen years' service and have become disabled for the full performance of their duties by reason of illness or otherwise (§ 62). State and metropolitan police officers must have become physically or mentally incapacitated by injuries sustained in the actual performance of their duties (§§ 68 and 69). Scrub women must have reached the age of sixty, with at least fifteen years' service, and have become physically or mentally incapacitated for labor, or, if less than sixty, the incapacity must be caused by reason of injury sustained in the performance of duty (§ 74). Under section 75 probation officers must be permanently disabled mentally or physically by reason of injuries or illness sustained in the performance of their duties (§ 75). Laborers, if under sixty, must have become physically or mentally incapacitated for labor by reason of an injury sustained in performance of duty. (See § 77.) Under section 80 firemen must be permanently disabled mentally or physically by injuries sustained or illness incurred in the performance of their duties.

There seems to be no clear indication of the legislative intent involved in these various qualifications among the different classes of employees. Thus, the only ones of whom it is specifically provided that they may be pensioned for illness incurred in the performance of their duties are pro-

bation officers, firemen and judges of the higher courts; but despite the lack of unity shown in the scheme of pensions, it is apparent that the Legislature did not mean that the word "injury" should include illness.

In my opinion, the word "injury" in said section 46 is used as meaning an injury caused by some external force, and the officer in question is not entitled to a pension. I do not mean to imply by this opinion that a nervous breakdown caused by an injury sustained by external force should not entitle an officer to a pension. When a question upon such facts arises it will be the proper time to decide it.

In rendering this opinion I am not unmindful of the fact that the Supreme Judicial Court, in defining the word "injury" as used in the Workmen's Compensation Act and as used in policies of accident insurance, has treated various diseases as being injuries. See, for example, *H. P. Hood & Sons* v. *Maryland Casualty Co.*, 206 Mass. 223, where it was held that glanders, caught by a hostler cleaning up a stable, was a bodily injury. See also *Mooradjian's Case*, 229 Mass. 521, where it was held that a physical impact is not an essential prerequisite to a personal injury, under the Workmen's Compensation Act. These cases, however, are not controlling in interpreting the word "injuries" as used in an act relative to pensions.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Commissioner of Public Safety — State Police — State Prison Colony.

State police may not be used as guards at the State Prison Colony.

DEC. 29, 1930.

Dr. A. WARREN STEARNS, *Commissioner of Correction.*

DEAR SIR: — You have sent me the following communication: —

"Very soon now it is expected that we shall be ready to house the inmate population of the State Prison Colony within the wall, and we hope very much to be able to utilize a detachment of State police for the purpose of guarding the wall.

Enclosed is a complete report from the superintendent of the institution of the plans contemplated, and I write to ask if there is any legal objection to the same."

The report which you have annexed to your letter outlines a plan by which detachments of the State police, from the unit commonly known as the constabulary, would be transferred from the direction of the Commissioner of Public Safety and placed under the "exclusive direction" of the superintendent of the State Prison Colony, and used for periods of months as wall guards for such colony.

The Attorney General does not pass upon questions of fact nor upon the expediency of schemes for the work of the various departments. In relation to the report which you have laid before me, however, and in answer to the question in your letter, I am constrained to say that, in my opinion, the suggested plan appears to be directly contrary to the intent of the Legislature as indicated in the various statutes concerning the State constabulary and prison officers and employees. The suggested plan appears to me to be one wholly without warrant under our existing laws, as it contemplates the use of the State constabulary for a purpose and in a manner unauthorized by statute.

I note a few only of the specific points applicable to the proposed plan, a consideration of which enters into the general conclusion which I have expressed: The Commissioner of Public Safety is without authority to divest himself and his subordinate officers of their plain duty of immediate direction and control of the men under their command; the Commissioner of Public Safety has no power to delegate his authority in relation to such men to the officials of another department; the Legislature has already provided appropriate means and methods for the employment of necessary guards in the Department of Correction, and has not indicated an intention to confuse the duties of the State constabulary with those of prison officials; nor has the Commissioner of Correction, or those in his department, been given any authority by the General Court to direct or command individuals or units of the State constabulary.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Sporting or Trapping License — Conviction — Revocation.

The holder of a sporting or trapping license who is found guilty of a violation of the fish and game laws, and does not appeal, has his license rendered void even if his case is placed on file or he is placed on probation.

JAN. 9, 1931.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You have called my attention to the provisions of G. L. c. 131, § 13, as amended by St. 1930, c. 393, § 2, as they relate to sporting or trapping licenses.

Said section 13, as amended, reads as follows: —

". . . Every license issued under said sections five to twelve, inclusive, held by any person convicted of a violation of any provision of this chapter, shall be void, and shall immediately be surrendered to the officer securing such conviction. The officer shall forthwith forward such void licenses to the director. No person shall be given a license under authority of said sections during the period of one year from the date of his conviction as aforesaid, and any such license so issued shall be void and shall be surrendered on demand of any officer authorized to enforce this chapter. No fee received for a license made void under this section shall be returned to the holder of such license."

You have requested my opinion upon the following questions: —

"1. If a defendant is found guilty of a violation of the fish and game laws and his case is placed on file, is his sporting or trapping license revoked by said section?

2. If a defendant is found guilty of a violation of said laws and is placed on probation for a definite or indefinite period, is his license revoked?

3. If a defendant is found guilty and a fine is imposed which is suspended for a definite or indefinite period, is a sporting or trapping license held by such person revoked?"

I note that in each of your questions it is stated, with relation to the facts therein severally contained, that the defendant was "found guilty."

Inasmuch as by the terms of the instant statute the deprivation of the privileges of a license must rest alone upon the conviction of the licensee,

your questions resolve themselves into an inquiry as to the meaning of the words "convicted" and "conviction" as used in this enactment.

The words "conviction" and "convicted" are used in our statutes with at least two different meanings, as has been pointed out by our Supreme Judicial Court. The first meaning may be described as technical and narrow, limited to a condition where a final judgment has been imposed. The second meaning may be described as the more common and broader, denoting a condition or state where there has been an establishment of guilt.

In *Commonwealth* v. *Gorham*, 99 Mass. 420, 422, the court said: —

"The term 'conviction' is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty; but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt."

In *Munkley* v. *Hoyt*, 179 Mass. 108, 109, the court said: —

"The word 'conviction' is used in at least two different senses in our statutes."

In *Mariano* v. *Judge of District Court*, 243 Mass. 90, 92, the court said: —

"Conviction ordinarily means a conclusive establishment of guilt. It imports that the question of guilt has been adjudicated and is not open to further inquiry as of right by the person convicted."

I am of the opinion that, as used in the instant statute, relative to loss of a license, the words "convicted" and "conviction" are used in their broader sense and mean a conclusive establishment of guilt; that is, a verdict or finding of guilty. In my opinion, it was the intention of the Legislature to provide that a verdict or finding of guilt by a competent tribunal should be the determining factor for the voiding of a license, and that the Legislature did not intend by the employment of the words in question that there must be a final judgment in a technical sense in a criminal case against the licensee before the license should become void.

(1) In consequence of these considerations I am impelled to answer your first question in the affirmative.

Upon the facts as you have presented them the defendant has been "found guilty," and I assume from the nature of the case, as you have briefly outlined it, that no appeal is pending. There has, then, been a "conclusive establishment of his guilt." It is immaterial, as I view the matter, whether the court has postponed the possibility of further action by filing the case or has proceeded to pronounce sentence.

I am aware that this conclusion is contrary to the opinion expressed upon a similar question by one of my predecessors in office in V Op. Atty. Gen. 401, 402. I do not concur in said opinion, first, because it appears to have been based upon a misconception of the facts in the case of *Commonwealth* v. *Kiley*, 150 Mass. 325, upon the authority of which it purports to rest; and, second, because its conclusions appear to have been already virtually overruled by an opinion of former Attorney General Benton, VII Op. Atty. Gen. 513.

(2) I answer your second question also in the affirmative.

Although the action of a court in placing upon probation a person already found guilty of an offense is not a final judgment nor necessarily a final disposition of the matter, nevertheless, since such a finding has been made, the defendant may, as in the case of placing upon file after finding or ver-

dict, be said to have been convicted, within the meaning of G. L., c. 131, § 13, as amended.

(3) I likewise answer your third question in the affirmative.

The imposition of a sentence, with no appeal therefrom, upon a defendant after he has been found guilty of an offense is a conclusive establishment of guilt. The suspension of the sentence does not leave the inquiry as to guilt still open for adjudication. The suspension, as has been said by the Supreme Judicial Court, "is for the advantage of the person convicted," and it would seem that in the case of a suspended sentence there has been a conviction, within the meaning of said G. L., c. 131, § 13, as amended. See *Mariano* v. *Judge of District Court*, 243 Mass. 90.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Pension — Retirement Association — Period of Service.

Service rendered by an employee prior to eligibility as a member of the Retirement Association is not to be deemed "active service," within the meaning of G. L., c. 32, § 5.

A member reinstated in said association is not deemed to have broken the continuity of such service by a previous withdrawal.

JAN. 27, 1931.

Hon. CHARLES F. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — Your Board requests the opinion of the Attorney General on the following question: Shall the Board, in computing a pension (prior pension) under section 5 (*2*) *C* (*b*) of G. L., c. 32, include any period of temporary service, under the provisions of lines 45 to 57, inclusive, of section 1 of said chapter?

Lines 45 to 57, inclusive, of section 1 read as follows: —

"Any member of the association who shall have withdrawn from the service of the commonwealth or metropolitan district after June first, nineteen hundred and twelve, on being re-employed in such service within two years, may be reinstated in said association in accordance with such rules for reinstatement as the board shall adopt, and when so reinstated the period of such withdrawal shall not operate to break the continuity of service, but shall not be counted as service. *All periods of active service* for the commonwealth or metropolitan district *rendered prior to June first, nineteen hundred and twelve*, by members of the association *shall be a part of their continuous service, and for the purpose of computing the accumulation for the pension for such service*, regular interest as defined in this section shall be allowed for all periods that are to be counted as service."

Section 5 (*2*) *C* (*b*), as amended, reads, in part, as follows: —

"Pensions based upon prior service. Any member of the association who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years or more immediately preceding and then or thereafter retires or is retired, any member who completes thirty-five years of continuous service and then or thereafter retires or is retired, and any member retired under section two (8), shall receive, in addition to the annuity and pension provided for by paragraphs (*2*) *B* and (*2*) *C* (*a*) of this section, an extra pension for life as large as the amount of the

annuity, computed under paragraph (*2*) *B* (*a*) of this section, and the pension, to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service, and if accordingly he had paid regular contributions from that date to June first, nineteen hundred and twelve at the same rate at which his contributions were first made and if such contributions had been accumulated with regular interest; . . ."

It is stated in the above-quoted paragraph that a member of the association shall receive, upon retirement, an "extra pension," for life, as large as the amount of the annuity and the pension to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service. When he entered the service he could not have acquired a claim, for, had the retirement system been in operation, he could not have been a member, as he had a temporary rating. See VIII Op. Atty. Gen. 20. You note the provision in section 1 that all periods of active service prior to June 1, 1912, shall be part of continuous service. As the member would not have been eligible to become a member, the question whether the period of service rendered prior to June 1, 1912, was "active service," within the meaning of these words as used in this statute, is immaterial.

Your second question reads as follows: —

"Does the aforesaid quoted paragraph, *i.e.*, section 1, lines 45 to 57, mean that a member may resign after thirteen years of service, and, upon reinstatement in the service within two years from the date of resignation, reinstate his membership in the Retirement Association, in accordance with rules adopted by the Board, and, after two more years of service, making a total of fifteen years — if he is then sixty years of age — request retirement under the provisions of section 2 (*4*), with the total aforesaid service, as one who has 'fifteen years of continuous service *immediately preceding* the date of retirement?'"

Lines 45 to 57 of section 1, to which you refer in this question and as applicable to the case you recite, provide that "any member . . . who shall have withdrawn from the service of the commonwealth . . . after June first, nineteen hundred and twelve, . . . may be reinstated . . . and when so reinstated the period of such withdrawal shall not operate to break the continuity of service, but shall not be counted as service."

This question must be answered in the affirmative.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Manufacture of Textile Goods — Employment of Women.

The employment of women after certain hours, in the manufacture of textile goods, is not forbidden to women doing work which constitutes finishing rather than manufacturing of such goods.

Feb. 4, 1931.

Gen. E. Leroy Sweetser, *Commissioner of Labor and Industries.*

Dear Sir: — I am in receipt of your request for an opinion as to whether persons employed on certain work and under certain conditions are to be considered as being employed in "the manufacture of textile goods," within the meaning of G. L., c. 149, § 59. The facts and question are set out in your letter as follows: —

"A manufacturer manufactures greige cotton cloth. Greige is a name applied to cotton cloth after the process of weaving has been completed, but before the cloth is otherwise finished.

It is customary for the manufacturer to have this cloth finished in its finishing plant or to sell it in the greige state to converters. Converters is a name applied to dealers who purchase greige goods and either sell the same to the trade in the greige state or after having the same finished.

The question is: Where cotton cloth in the greige state is sold by the manufacturer thereof to a converter, and the converter, who may then move the goods if he chooses or have the same finished by the manufacturer, elects to have the goods finished in the manufacturer's print works at a price agreed upon by the converter and the management of the print works, the print works being an entirely separate establishment but owned by the manufacturer, in view of the definitions of 'manufacturing establishments' and of 'print works' in G. L., c. 149, § 1, are women engaged in the various processes of finishing these goods in the manufacturer's print works, such as bleaching, trimming, folding, etc., employed in 'the manufacture of textile goods,' within the meaning of G. L., c. 149, § 59, which provides as follows: 'No person, and no agent or officer of a person, shall employ a woman over twenty-one in any capacity for the purpose of manufacturing before six o'clock in the morning or after ten o'clock in the evening, or in the manufacture of textile goods after six o'clock in the evening.'"

Two points are presented by your question: (1) Whether the doing of the work described by you and under the circumstances set forth is to be considered manufacturing, and therefore comprehended within the meaning of the word "manufacture" as used in G. L., c. 149, § 59; and (2) if this process is manufacturing, is it the manufacture of textile goods?

1. Both before and after the process of finishing is worked upon the cloth in the case stated by you, the product is cotton cloth. You state, however, that before it is finished it has the distinctive name "greige," and I am informed that after being finished it is called "print." Webster's dictionary gives one definition of the noun "print" as "the printed cloth." The test of manufacture set forth in *Anheuser-Busch Brewing Assn.* v. *United States*, 207 U. S. 556, is, — "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" The word "manufacture" is defined in I Op. Atty. Gen. 209, as "the production of articles for use from raw or prepared materials by giving these materials new forms." It also has the meaning of "to work, as raw or partly wrought materials into suitable forms for use," as stated in *Commonwealth* v. *Green*, 253 Mass. 458. The principle involved in the question of whether the finishing of greige cloth, as described in your letter, is manufacturing is much the same as that in *Lee* v. *Templeton*, 6 Gray, 579, where palm-leaf hats, received in an imperfect state, were put through the process of bleaching, pressing and dressing. This process was referred to as being a process of manufacture. Another expression used to describe such processes is "each being a step in manufacturing." *Riter-Conley Mfg. Co.* v. *Aiken*, 203 Fed. 699. Surely, the change in the case we are considering is as great as that discussed in *Marks* v. *United States*, 196 Fed. 476, where by certain processes crude opium was manufactured into smoking opium.

Applying these principles, I would say that it appears from your letter that this cotton cloth in the greige state is either prepared material or

partly wrought material which, upon being finished in the manufacturer's print works, is given a new form or is worked into a suitable form for use, as well as being transformed into a new and different article having a distinctive name, character or use. The process of finishing, therefore, would be included within the meaning of the word "manufacture."

2. The second point raised by your question, whether the process of manufacture described in your letter is the "manufacture of textile goods," however, is governed by the principles of law set forth by one of my predecessors in office in an opinion to the Commissioner of Labor, dated April 24, 1919 (not printed), with which I concur, and which I am advised has been followed consistently since that date in the rulings of your department. I quote this opinion in full.

"You have requested my opinion as to the exact meaning of the words 'textile goods,' found in section 51 of chapter 514 of the Acts of 1909, and also as to whether or not bleaching, dyeing, finishing, printing and yarn converting is to be considered 'the manufacture of textile goods.'

Section 51 of chapter 514 of the Acts of 1909 provides in part as follows: '. . . No person, and no agent or officer of a person or corporation engaged in the manufacture of textile goods, shall employ a woman or a minor before six o'clock in the morning or after six o'clock in the evening. . . .'

The exact meaning of the words 'textile goods' was given by this department in 1907. The Honorable Dana Malone said, in an opinion at that time, —

'The word "textile" as an adjective is defined to be "of or pertaining to weaving. Woven, or capable of being woven; formed by weaving: as, *textile* fabrics; *textile* materials, such as wool, flax, silk, cotton." The term "textile fabrics," which may be regarded as synonymous with the words "textile goods," as used, . . . has been defined to include those fabrics woven, as carpets, or capable of being woven or formed by weaving, and the noun "textile" to be a fabric which is woven or may be woven, — a fabric made by weaving. See *Wood* v. *Allen*, 111 Ia. 97, 100.' (See III Op. Atty.-Gen. 127.)

Accordingly, if bleaching, dyeing, finishing, printing and yarn converting is done as a part of and connected with the manufacture of fabric by weaving, an establishment where this process is employed must be held to come within the terms of the statute. Otherwise, your question is to be answered in the negative."

The Attorney General does not pass upon questions of fact, but it appears from your letter that in the particular instance of manufacturing as to which you inquire the process of weaving has been completed and the various processes of finishing are entirely independent of and apart from the making of the fabric by weaving. This being so, consistently with the foregoing opinion of 1919 I am constrained to hold that G. L., c. 149, § 59, which prohibits the employment of women after six o'clock in the evening in "the manufacture of textile goods," does not apply to the employment of women in the doing of the work described in your letter in the manner and under the conditions set forth therein.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Department of the Auditor of the Commonwealth — Employees — Civil Service.

Appointments of employees by the Auditor of the Commonwealth, under G. L., c. 11, § 6, as amended, are governed by the civil service rules.

Feb. 19, 1931.

Hon. Francis X. Hurley, *Auditor of the Commonwealth.*

Dear Sir: — I am in receipt from you of a request for an opinion, which reads, in part, as follows: —

"Will you kindly give me an opinion as to whether or not the Department of the State Auditor is governed by the rules and regulations of the Department of Civil Service and Registration. May I call your attention to St. 1923, c. 362, § 15, the first sentence whereof reads: 'The state auditor may appoint and remove such employees as the work of the department may require, and fix their compensation.'"

Inasmuch as you direct my attention specifically to St. 1923, c. 362, § 15, amending G. L., c. 11, § 6, which deals with employees generally in your department, I confine myself to a consideration of the question of whether or not your department is governed in relation to such employees by the rules and regulations of civil service. Said St. 1923, c. 362, § 15, reads as follows: —

"The state auditor may appoint and remove such employees as the work of the department may require, and fix their compensation. Said employees shall be organized in two divisions, namely, the division of receipts and the division of disbursements. The employees in the division of receipts shall be qualified to check actual receipts."

It has been held in former opinions of Attorneys General that appointive positions in the government of the Commonwealth are presumptively under civil service, and that, in order to hold that such positions are not subject to civil service, it must appear that they were specifically exempted, or it must be apparent, from the context of the statute creating the positions or providing for the appointment to or removal from said positions, that it was the intention of the Legislature that said rules and regulations should not apply to these positions. Attorney General's Report, 1930, p. 115. See IV Op. Atty. Gen. 619; VI Op. Atty. Gen. 152.

The question, then, is whether the words "appoint and remove employees as the work of the department may require," as used in the instant statute, disclose a legislative intent to exempt such employees from the provisions of the civil service rules and regulations.

It has been held that a legislative intent that civil service rules and regulations should not apply might properly be found to exist from the use in certain statutes, relative to particular branches of the public service, of such expressions as "serve at the pleasure of the board," "may remove them at pleasure" and "shall be appointed to hold office until removal and may be removed at any time by written order stating the cause of removal." VI Op. Atty. Gen. 152; 334. VII Op. Atty. Gen. 719. If a removal can be made at the pleasure of a board or appointing body, plainly that is inconsistent with the rules of civil service. Likewise, when the removal can be made "at any time by written order stating the cause of removal," a method is set up for the removal that is wholly at variance with the method provided by the civil service rules and regulations.

In the instant statute, as amended, however, the words "may appoint and remove such employees as the work of his department may require" do not show any intent that a removal may be made in a manner other than that which the rules of civil service contemplate. The power to appoint and remove, limited merely "as the work of the department may require," is perfectly consistent with the rules and regulations of civil service being applicable. This particular statute might, with no conflict or inconsistency with its other terms, have been worded, — "may appoint and remove in accordance with existing laws, rules and regulations such employees as the work of the department may require," without enlarging its meaning as it now reads. A legislative intent to place the positions mentioned in said section 6 of the instant statute, as amended, outside the scope of civil service rules and regulations does not appear from the context.

I am of the opinion, therefore, that appointments made or to be made under G. L., c. 11, § 6, as amended by St. 1923, c. 362, § 15, should be made in accordance with the rules and regulations of the Department of Civil Service and Registration. The special provisions relative to certain examiners in your department, made by St. 1920, c. 428, and St. 1921, c. 380, relate only to particular employees appointed in 1920, and are not as to such employees controlled by the terms of said section 6, as amended.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Department of the Auditor of the Commonwealth — Duties of Employees — Qualifications.

Employees of the Auditor of the Commonwealth are not required to be qualified to inspect or examine the quality of commodities.

MARCH 4, 1931.

Hon. FRANCIS X. HURLEY, *Auditor of the Commonwealth.*

DEAR SIR: — I am in receipt of your request for my opinion as to the meaning of the words "actual receipts," as used in G. L., c. 11, § 6, as amended by St. 1923, c. 362, § 15. This section, as amended, reads as follows: —

"The state auditor may appoint and remove such employees as the work of the department may require, and fix their compensation. Said employees shall be organized in two divisions, namely, the division of receipts and the division of disbursements. The employees in the division of receipts shall be qualified to check actual receipts."

An examination of this section discloses that it does not outline the work of the department nor the duties of the employees of the department. Such work and duties are outlined by G. L., c. 11, § 12, as amended by St. 1923, c. 362, § 16, which is as follows: —

"The department of the state auditor shall annually make a careful audit of the accounts of all departments, offices, commissions, institutions and activities of the commonwealth, including those of the income tax division of the department of corporations and taxation, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such accounts at reasonable times and said department may require the production of books, documents and vouchers, except tax returns, relating to any matter within the scope of such audit. The accounts of the last named department shall be subject

at any time to such examination as the governor and council or the general court may order. Said department shall comply with any written regulations, consistent with law, relative to its duties made by the governor and council. This section shall not apply to the accounts of state officers which the director of accounts of the department of corporations and taxation is required by law to examine. The department of the state auditor shall keep no books or records except records of audits made by it, and its annual report shall relate only to such audits."

The plain meaning of section 12, as amended, is that the Department of the Auditor of the Commonwealth shall make a careful audit of all departments, offices, commissions, institutions and activities of the Commonwealth, except such as are expressly exempted in the statute. Section 6 of this chapter, as amended, should therefore be read in conjunction with section 12, as amended. It would then appear that the words "disbursements" and "receipts" have the usual meaning given to them in accounting, "disbursements" meaning the payment of money by the Commonwealth and "receipts" meaning the payment of money to the Commonwealth. The provision, then, that there shall be two divisions in the Department of the Auditor of the Commonwealth, one a division of disbursements and the other a division of receipts, would mean that the division of disbursements would check the accounts showing the payments approved and authorized by the various departments; and the other, the division of receipts, would check the accounts showing the actual receipt of money taken in by the various departments.

It would follow, therefore, that the words "actual receipts," as used in the sentence "The employees in the division of receipts shall be qualified to check actual receipts," mean actual payments taken in by the various departments, offices, commissions, institutions and activities of the Commonwealth. I am confirmed in this view by the fact that the duty of examining the accounts and demands against the Commonwealth, while formerly that of the Auditor, under G. L., c. 11, § 7 (see *Opinion of the Justices*, 13 Allen, 593), with the repeal of this section and the enactment of St. 1923, c. 362, § 1, was transferred to the Comptroller, and that all the duties formerly placed upon the Auditor, except such only as relate to the making of audits, have been withdrawn from him by the provisions of said St. 1923, c. 362. I am of the opinion, therefore, that the words "check actual receipts," as used in the instant statute, do not refer to inspection or examination of the quality of commodities purchased by or for the various subdivisions of the administrative forces of the Commonwealth.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Elective Officers of Worcester County — Statute.

If an elective officer in Worcester County is permitted by the Legislature to hold office after he becomes seventy years of age, he will be entitled to the benefits of the retirement system when his term of office ends, if he then be over seventy.

MARCH 6, 1931.

ALBERT BULLOCK, Esq., *House Chairman, Committee on Pensions.*

DEAR SIR: — You inform me that the Committee on Pensions requests answer to the following question: If the officers of Worcester County

should serve out the remainders of their terms of office as proposed in Senate Bill No. 80, would they then be entitled to a pension, should the bill become a law, in that they would be over seventy years, beyond the age set when pensions, as provided by law, are payable.

The elective officers of Worcester County are included among the persons who may become members of the retirement system in Worcester County. St. 1926, c. 378, § 1.

It is provided by G. L., c. 32, § 22 (4), that —

"Any member who reaches the age of sixty and has been in the continuous service of the county for fifteen years immediately preceding may retire, or be retired by the board upon recommendation of the head of the department in which he is employed, and any member who reaches the age of seventy shall so retire."

The proposed bill (Senate No. 80) provides: —

"Any incumbent of a county office in the County of Worcester shall, irrespective of age, be entitled to hold office for the remainder of the term to which elected."

It will be noted that the provision regarding retirement is not that a member shall be retired when seventy years of age, but, rather, that any member who reaches the age of seventy shall so retire. The proposed statute allows such officers to hold office for the remainder of the term for which they were elected. These officers, therefore, at the end of their term will have reached seventy if they are over that age. They will then be entitled to the payments provided for by the provisions of the retirement act upon their retiring at the end of the term for which they are elected.

My answer, therefore, is in the affirmative.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Clerks of Court — Naturalization — Returns.

Clerks of court must make returns to the Secretary of the Commonwealth relative to naturalization, as prescribed by G. L., c. 220, § 19.

MARCH 10, 1931.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion as to whether or not it is necessary for the clerk of each court to make return of the name, age, occupation and residence of every person naturalized, as provided in G. L., c. 220, § 19, which reads as follows: —

"The clerk of each court shall annually, on or before February first, make to the state secretary a return of the name, age, occupation and residence of every person naturalized prior to the preceding January first, the date of the naturalization and the names and residences of the witnesses. Such returns shall be preserved by the secretary in a form convenient for reference."

You write that you are asking this because at least one of the clerks of court is of the opinion that this law only applied prior to 1906, "when the Federal government took over naturalization procedure." In his letter, which you forwarded to me, he states, in part: —

"An examination will disclose that section 19 was originally section 5 of

St. 1885, c. 345, and, therefore, was passed at a time when the Commonwealth had and exercised naturalization jurisdiction."

He then quotes the following from the case of *County of Berkshire* v. *Cande*, 222 Mass. 87: —

"'It cannot be assumed that St. 1908, c. 253 (disposition of fees), was intended to apply to naturalization as treated in R. L. 166, §§ 14 to 18 (now chapter 220). Those sections were enacted when naturalization fees were under the control of the State Legislature and *became suspended when the Congress acted within its jurisdiction touching the same subject.*'"

U. S. Const., art. I, § 8, conferred upon Congress the power "to establish an uniform rule of naturalization." That power was first exercised by U. S. Stat. at L., c. 3, of 1790, since which time the Federal government has continued to exercise its power in naturalization proceedings.

By the act of 1906, referred to in the letter to you, Congress acted upon the subject of naturalization fees, which had formerly been left for regulation by the several States. Mass. R. L. (1902), c. 166, § 18, dealt with the subject of naturalization fees. That section was omitted from our General Laws of 1921. R. L., c. 166, § 17, however, was re-enacted in the General Laws and is now section 19 of chapter 220, concerning which you write and which I have set forth above.

The Federal statute (U. S. Comp. St. 1918, §§ 4351–7) relating to naturalization does not purport to deal with the relations of a State officer with the State. It merely confers the right upon certain State courts to act in naturalization proceedings. The Legislature of any State may prohibit its courts from exercising that right, as was done in Massachusetts by St. 1855, c. 28, § 1, which reads: —

"It shall not be lawful for any court established by the laws of this commonwealth, or for any clerk thereof, to receive or entertain any primary or final declaration or application, made by or on behalf of any alien, to become a citizen of the United States, or to receive any registry of an alien, or to entertain jurisdiction for the naturalization of aliens."

Or it may authorize the courts to act under the power granted by Congress, as has been done by our General Laws (c. 220, § 15): —

"The supreme judicial court and the superior court shall have jurisdiction to naturalize aliens resident within their respective judicial districts in the manner set forth in the federal laws relative to naturalization."

In regard to the general intent of Congress not to interfere with the relations of a State with its own officers under a naturalization statute, the Supreme Court of the United States, in *Mulcrevy* v. *San Francisco*, 231 U. S. 669, 674, said: —

"The act does not purport to deal with the relations of a state officer with the State. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a State in antagonism to the laws of the State — the laws which give them their official status."

Since, as I have said, the Federal statute does not by its terms restrict or make incompatible with other duties the making of returns by clerks of State courts to designated State officials, the State Legislature may require from its clerks of court such additional information in regard to naturaliza-

tion, not in conflict with the Federal statute, as it may from time to time see fit.

I am therefore of the opinion that it is necessary for the clerk of each court, as provided in G. L., c. 220, § 19, annually, on or before February first, to make to you a return of the name, age, occupation and residence of every person naturalized prior to the preceding January first, the date of the naturalization and the names and residences of the witnesses.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Liability Insurance Company — Defense of Actions.

A liability insurance company is not authorized to defend an action which relates to a liability not covered by a policy.

MARCH 11, 1931.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have in a communication to me set forth the following facts: —

"A certain insurance company licensed to transact liability insurance under said clause Sixth (G. L., c. 175, § 47, cl. 6th), as amended, defends or agrees to defend actions of tort brought against dentists, physicians or surgeons insured by it under what is called a malpractice liability policy, although said actions may be based on alleged criminal acts of the insured, against legal liability *for which the company is not permitted* under section 3 of said chapter 175 *to insure.* The company pays the costs of defending the action through counsel employed by it, but it does not pay or agree to pay any judgment which may be rendered against the insured in such a case."

In connection with said facts you have asked my opinion as follows: —

"Do the provisions of G. L., c. 221, §§ 46 and 47, as amended, permit an insurance company authorized to transact liability insurance under the Second, Fifth, Sixth or Eighth clauses of G. L., c. 175, § 47, as amended, to engage in the general practice of the law, or to defend or to agree to defend any and all civil actions begun against any person other than itself, *irrespective of whether or not such actions are brought on account of a liability against which such person is insured* under a liability policy issued under any one of said clauses?"

If a contract of insurance into which a company enters is not one which it is authorized to make, such contract is not valid, and the company may not lawfully act thereunder in so far as it is not valid.

The question which you have put before me assumes, by its phraseology, that the contract to which it refers insures against hazards as to which the company issuing it is not authorized to insure, and your statement of facts as to which the question relates also assumes, by its terms, that the agreement of the insurance company and the acts done in pursuance thereof relate to a hazard or hazards "for which the company is not permitted under section 3 of said chapter 175 to insure."

In the form in which your question stands I must answer it in the negative, for the provisions of G. L., c. 221, §§ 46 and 47, exempting liability insurance companies from a general prohibition against the practice of law by corporations, do not enlarge the authority of an insurance company

to make contracts not authorized by the provisions of G. L., c. 175, as amended, nor to perform acts in pursuance of such unauthorized contracts, the making of which is explicitly forbidden by G. L., c. 175, § 3, as amended.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Officers — Municipalities — Appointment — Tenure of Office.

Public officers in general hold office until their successors are qualified.
The appointing authority vested in a mayor is an executive power, and a statutory provision for its exercise is mandatory.
The authority to confirm an executive appointment must be exercised within statutory limitations by the body on whom it is conferred.

MARCH 12, 1931.

Hon. CHESTER W. ALLEN, *Senate Chairman, Committee on Cities.*

DEAR SIR: — You have requested my opinion on the following questions: —

"A. Whether or not there now exists by statute law or judicial decision any limitation upon the time which an appointed office holder can continue to hold his office and perform the duties thereof after his term of office has expired?"

An answer to this question can only be given after an extended search of the judicial decisions and an examination of the charter provisions of the several cities in the Commonwealth, and acts in amendment thereof or in addition thereto, and of the ordinances of said cities. The time within which this opinion is required does not permit such a search or examination. Many statutes provide in substance that a person appointed to a particular office shall hold such office until his successor is appointed or elected and qualified. Generally, it may be said that a person appointed to an office may hold such office until his successor is appointed and qualified. This seems to be in the interest of the public business. Were it otherwise, occasions might arise where a particular office would close as a result of failure to appoint or elect a successor. Great inconvenience to the public would result thereby.

"B. Is the appointing power granted to a mayor, as provided in G. L. c. 43, § 60, an executive function? Does the provision that certain department heads 'shall be appointed by the mayor' imply any obligation on the mayor to make appointments to such office?"

G. L. c. 43, § 58, provides, in part: —

"There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. . . ."

See also G. L. c. 43, §§ 48 and 74.

Section 87 of said chapter (Plan D) provides: —

"The mayor shall be the official head of the city."

In *Dooling* v. *Fitchburg*, 242 Mass. 599, 601, the court said: —

"The form of city charter known as Plan B, establishes a city government whose chief officer is the mayor, and whose legislative powers are lodged in the city council. G. L. c. 43, §§ 58, 59. Numerous sections of

this chapter disclose the plain aim to centralize executive authority and administrative responsibility in the mayor and to confine the city council to legislative functions."

In *Murphy* v. *Webster*, 131 Mass. 482, 488, the court said: —

"The power to appoint and the power to remove officers are in their nature executive powers. . . . The mayor is the chief executive of the city and has the exclusive power of nomination."

I therefore answer the first question in this paragraph in the affirmative.

My answer to the second question is that the provision in said section 60 that "all heads of departments and members of municipal boards . . . as their terms of office expire, shall be appointed by the mayor" is mandatory. A duty is thus imposed upon the mayor to appoint, and, upon his failure, he can be ordered to do so by writ of mandamus.

"C. In said section 60, where it is provided that heads of certain departments 'shall be appointed by the mayor, subject to confirmation by the city council,' is the intent and purpose of that provision that the power to appoint may be nullified or made void through a continued refusal to confirm the appointment so made?

Can there be any limitation on the exercise of the power to confirm granted under this section?

Can there be an abuse of the right granted the city council to confirm?

If an abuse of the provision to confirm could be maintained at law, would it be sufficient cause for the limitation of the power to confirm?"

If the word "intent" in the first question in this paragraph is used in a non-technical sense, I answer your question in the affirmative; if it is used in a technical sense, my answer is in the negative. The provisions of said section 60, herein quoted, signify the application of sound judgment by the city council upon the qualifications of a person appointed to a particular office. They require the exercise of faculties of criticism and discrimination. They denote positive sanction of the council to an appointment of the mayor before such appointee may enter upon the discharge of the duties of the office to which he has been appointed. It is the duty of the council to act in good faith upon a pending nomination and others that may be made.

I answer the second question in this paragraph in the affirmative. It is within the authority of the Legislature to impose any limitation it sees fit upon the exercise of the power to confirm. Under Plan A form of city charter (G. L. c. 43, §§ 46–55, inclusive) "all department heads and members of municipal boards . . . shall be appointed by the mayor without confirmation by the city council."

I answer the third question in the affirmative. Abuses may arise in any given case.

The fourth question in this paragraph needs no reply, as I have indicated that the Legislature has power to impose limitations, and the sufficiency of the cause for such imposition is not involved.

"D. Does 'subject to confirmation by the city council' mean or intend that it shall be impossible for the mayor to fill vacancies in the office of heads of departments without the approval of the majority of the city council under any and all circumstances?"

The answer to this question is covered by the answer to the first question in paragraph C.

"E. Could a continued refusal of the majority of the city council to confirm an appointee of the mayor, or a series of appointments made during a number of years, be held to defeat the intent and purpose of G. L., c. 43, and amendments thereto, wherein the intent is clear that the mayor, as chief executive of a city, is to be held responsible for the conduct of all its departments?"

Unless it is made to appear in an appropriate judicial proceeding that the city council has not acted in good faith, it is my opinion that the "continued refusal of the majority of the city council to confirm an appointee of the mayor, or a series of appointments made during a number of years," cannot be held to defeat the intent and purpose of chapter 43; that, as stated by you, the mayor is to be held responsible for the conduct of all departments of a city. The mayor is the executive head of a city, and even if the city council refuses to confirm his appointment, or appointments, to a particular office, the holder of such office, pending the appointment and qualification of his successor, is subordinate to the mayor and is subject to his lawful commands. The mayor's responsibility for the conduct of all departments of the city is not relaxed in any sense because of the refusal to confirm a particular appointee.

"F. If the appointment of a head of a department is held to be an executive function, may not this power of confirmation, when exercised for the sole purpose of maintaining in office a head of a department for a number of years, become the assumption of an executive function by the city council, at least in so far as in its operation it may, in fact, make of the office holder the appointee of the city council?"

The confirmation by the city council of an appointment of a mayor is a quasi executive function. If by the foregoing question you mean "the exercise of the appointing power by the city council," it cannot be said that such action in any sense "becomes the assumption of an executive function by the city council." The duties of the mayor and city council are distinct. Neither can exercise the powers of the other. *Dooling* v. *Fitchburg, supra.*

"G. May the Legislature enact legislation of a general character to define or limit the provision, wherever it may appear in our General Laws, that certain appointments are to be made subject to confirmation by a legislative branch of a municipal government?"

I answer the foregoing question in the affirmative.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Department of Mental Diseases — Purchase of Land — Options.

A department may make small payments for options for land, in anticipation of a future appropriation, from money already appropriated for expenses incidental to the selection of a site for a school.

MARCH 30, 1931.

DR. GEORGE M. KLINE, *Commissioner of Mental Diseases.*

DEAR SIR: — You request my opinion as to whether St. 1930, c. 115, § 2, item 534, requires that, — "(1) the whole site (for a new school for the feeble-minded) be bought for the $50,000 already appropriated; and (2)

if not, whether the Commonwealth can make small payments on agreements or options, whereby the property will be held for not less than one year, in anticipation of a further appropriation being made by the Legislature sufficient to take up the amounts covered by the agreements."

Said chapter 115 is the general appropriation act of 1930. Section 1 of that chapter reads as follows: —

"To provide for the maintenance of the several departments, boards, commissions and institutions, of sundry other services, and for certain permanent improvements, and to meet certain requirements of law, the sums set forth in section two, for the several purposes and subject to the conditions therein specified, are hereby appropriated from the general fund or revenue of the commonwealth unless some other source of revenue is expressed, subject to the provisions of law regulating the disbursement of public funds and the approval thereof, for the fiscal year ending November thirtieth, nineteen hundred and thirty, or for such other period as may be specified."

Section 2, item 534, under the general heading "Service of the Department of Mental Diseases," reads as follows: —

"New School for Feeble-minded:
For expenses incidental to the selection of a site and the purchase of land or options thereon for a new school for the feeble-minded, a sum not exceeding fifty thousand dollars . . . . . $50,000.00"

You have submitted to me, for consideration in connection with the questions raised by you, a copy of your letter of January 25, 1930, to the Chairman of the Commission on Administration and Finance outlining the program of your department "for additional provisions for the care and treatment of the feeble-minded over the period of the next five years," which letter further states, in part: —

"It cannot be expected that a site for the fourth school for feeble-minded can be acquired, if an appropriation is made available for the purpose, in less than one year, but, inasmuch as the development of such an institution must be a gradual one, the department contemplates this development along the same lines as was followed at the Belchertown State School, namely, maintaining during the first years of construction this future institution for feeble-minded as a colony, presumably of the Walter E. Fernald State School.

Within a five-year period, as the department views the development of this future fourth school for the feeble-minded, it is believed that the sum of $1,000,000 should be set aside in the five-year program."

Upon inquiry from your department I am informed that "the fourth school for feeble-minded," referred to in your said letter of January 25, 1930, is the same as the "new school for feeble-minded," referred to in St. 1930, c. 115, § 2, item 534.

Upon consideration of the first question submitted by you, I am of the opinion that the provisions of the act of 1930, above quoted, do not require that the whole site for the new school for the feeble-minded be bought for the $50,000 already appropriated.

Upon consideration of the second question submitted, I am of the opinion that the Commonwealth can make small payments on agreements or options, such payments, in my opinion, being "expenses incidental to the selection of a site and the purchase of land or options thereon," within

the meaning of the act, whereby the property will be held for not less than one year in anticipation of a future appropriation being made by the Legislature sufficient to take up the amounts covered by the agreements.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Blasting — Permits.

Legislation providing a mode of classification of persons entitled to permits for blasting, not based upon a substantial distinction among those seeking such permits, is unconstitutional.

APRIL 27, 1931.

Hon. MALCOLM L. BELL, *Senate Chairman, Committee on Public Safety.*

DEAR SIR: — You have requested my opinion as to the constitutionality, if enacted into law, of the provisions of Senate Bill No. 429, being "An Act providing for the local control of blasting operations," as well as the amendment thereto which was submitted therewith.

Senate No. 429 amends G. L., c. 148, § 9, as appearing in St. 1930, c. 399, § 1, by adding the following provision: —

"and may therein provide for the issuance and revocation of permits by the head of the fire department or other municipal board or officer authorizing the use of dynamite and other explosives in blasting rock, stone and other substances, and prohibiting such use except in pursuance of such a permit in full force and effect."

It also amends said chapter 148 by striking out section 21 as it appears and inserting in place thereof the following: —

"The superior court shall have jurisdiction in equity, upon the petition of the commonwealth or of a city or town, to enforce the laws of the commonwealth, the regulations of the department, and the ordinances and by-laws of a city or town, relative to the blasting of rock, stone or other substance with any explosive."

In my opinion, Senate No. 429 is constitutional.

The present laws delegate to cities and towns the right to regulate the subject matter of said section 9 by by-laws and ordinances not inconsistent with rules and regulations formulated by the Department of Public Safety. The addition to said section 9 proposed by Senate No. 429 adds a provision that said by-laws and ordinances may provide for the issuance and revocation of permits. This clearly authorizes cities and towns to provide a system of permits as a means of enforcing said by-laws and ordinances. There is some doubt under the present law whether or not such right is included in the bare authorization to enact ordinances and by-laws. This change is clearly constitutional.

Senate No. 429 amends said section 21 by giving the Superior Court jurisdiction in equity to enforce ordinances and by-laws enacted by cities and towns in pursuance of the authority vested in them by said section 9. This change merely provides a remedy for the enforcement of such ordinances and by-laws as are enacted in conformity with the provisions of said section 9, and is clearly constitutional.

The amendment to Senate No. 429 submitted therewith provides for an addition to section 9, as proposed in Senate No. 429, as follows: —

"Provided, however, that any person aggrieved by the granting or refusal to grant a permit required by any ordinances or by-laws adopted under the authority of this section or by the revocation or failure to revoke such permit, may appeal from such action to the fire marshal, and may appeal from the decision of the fire marshal to the superior court, for a determination whether such original action in granting or refusing to grant or in revoking or in refusing to revoke such permit is reasonable under all the circumstances, and until the determination of such appeal a person who has been regularly engaged in blasting rock, stone and other substances for a period of at least three years prior to the passage of this act, shall be entitled to continue such blasting, subject, however, to all provisions of law applicable thereto. Such appeal shall be filed within ten days of the decision appealed from, and the appellants shall be given a speedy hearing by the fire marshal and by the superior court."

The first part of this proposed amendment provides for an appeal from the decision of the municipal officer empowered by Senate No. 429 to grant permits to the Fire Marshal and a further appeal from the Fire Marshal to the Superior Court. This change merely provides procedure for appeal, and is clearly constitutional.

The last part of the proposed amendment provides that if a decision adverse to an applicant is made by a municipal officer, under the authority conferred upon him by virtue of Senate No. 429, on the question of the issuing or revocation of a permit, and if the applicant takes an appeal to the Fire Marshal under the provision in the first part of the proposed amendment, and subsequently to the Superior Court, the applicant may be permitted to continue blasting operations pending this appeal until a final determination, provided that said applicant is "a person who has been regularly engaged in blasting rock, stone and other substances for a period of at least three years prior to the passage of this act." This provision grants a special privilege to a particular class. Whether or not this classification violates the constitutional guaranty contained in the Fourteenth Amendment to the Constitution of the United States, as to equal protection under the laws, depends upon whether or not said classification is reasonable and material and is based on substantial distinctions with reference to the subject matter.

In my opinion, the said classification is not based on a substantial distinction with reference to the subject matter, and the last part of the proposed amendment is therefore unconstitutional.

The municipal board and the Fire Marshal, on appeal, in considering the question of granting or revoking a permit for blasting must necessarily take into consideration many matters, including not only the capacity and ability of the applicant to conduct blasting but also the nature of the blasting operations for which said permit is sought, and the locality in which said blasting is to be performed. If the facts, upon which is based the creation of a class to receive a benefit which is denied to others, tend to show a substantial distinction which may reasonably be drawn between classes subject to the operation of the law, a mode of classification based upon such facts may be reasonable and proper. If such facts do not tend to show that such a distinction may reasonably be so drawn, the creation of a class to receive particular exemptions or benefits is an unreasonable, and so an unconstitutional, measure.

In regard to the subject matter of the instant legislation, if the only facts upon which the municipal officers and Fire Marshal were to base their rul-

ings as to the grant or revocation of a permit were the experience, ability and character of the applicant, a classification based upon the length of such actual experience might be reasonable and material and is founded on a substantial distinction between those within the scope of the statute. But, as has been pointed out, there are other facts in addition to those relating to experience, ability and character of the applicant upon which the said officers must base their rulings, and the single consideration of length of actual experience bears no relation to their determination, and of itself alone no controlling influence upon the finding which is ultimately to be made. If it is undesirable that blasting should be conducted in a certain locality, it is immaterial whether the applicant has been in business for three years, ten years or ten days. In my opinion, therefore, the last part of the proposed amendment is unconstitutional. See *Fountain Park Co.* v. *Hensler*, (Ind.) 155 N. E. 465, 50 A. L. R. 1518; *Wyeth* v. *Board of Health*, 200 Mass. 474; *State ex rel. Kempinger* v. *Whyte*, (Wisc.) 188 N. W. 607, 23 A. L. R. 67.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Municipalities — Persons receiving Support.

Persons receiving support, employed by municipalities without pay, under G. L., c. 117, § 2, are not under civil service.

MAY 13, 1931.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: — You state that persons receiving support from cities and towns under G. L., c. 117, § 1, are performing labor for such cities and towns under the provisions of section 2 of said chapter, and you request my opinion as to whether this involves any violation of the civil service law.

In my opinion, the civil service law applies only to the employment of labor under contract. Among other considerations it may be noted that the remedy given by the civil service statute against illegal employment is to stop the pay of the person so employed (G. L., c. 31, § 38). The persons here in question are not receiving any pay. They receive no consideration for the work which they do. The support which they are receiving they are entitled to anyway (G. L., c. 117, § 1). Section 2 of the statute (G. L., c. 117) authorizes the city or town to make use of their services.

Of course, if in any case a trade is made with a person who is not otherwise entitled to receive, and is receiving, support under chapter 117, by which such support is to be given in consideration of work done, that would be in fraud of civil service and it would be your duty to interfere. I do not understand that your question refers to such a case.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Commissioner of Public Safety — State Fire Marshal — Explosives — Rules.

The duty to make rules and regulations relative to explosives rests upon the Fire Marshal, under G. L., c. 148, as amended.

May 13, 1931.

Gen. Alfred F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You request my opinion upon the following questions: —

"(1) Is it the duty and responsibility of the Commissioner of Public Safety, acting for the department, to make the rules and regulations required by the provisions of G. L., c. 148?

(2) In the event that no rules and regulations are submitted to the Commissioner of Public Safety by the State Fire Marshal in accordance with G. L., c. 148, § 10, what is then the duty of the Commissioner?"

G. L., c. 148, § 9, as amended by St. 1930, c. 399, reads, in part, as follows: —

"The department shall make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, . . ."

Section 10 of said act is as follows: —

"The marshal shall submit to the commissioner rules and regulations required to be made by the department under any of the provisions of this chapter and shall, upon request of the commissioner, so submit rules and regulations which the department is authorized to make hereunder, and the same shall take effect, subject to section thirty-seven of chapter thirty, when approved by the commissioner and by the governor and council, and on such dates as the governor and council may fix."

The Department of Public Safety is under the "supervision and control" of the Commissioner, who is the "executive and administrative head of the department." Gen. St. 1919, c. 350, §§ 99 *et seq.*; G. L., c. 22, §§ 1 and 3. There is "in the department" a "division of fire prevention under the charge of a director to be known as state fire marshal." Gen. St. 1919, c. 350, § 101; G. L., c. 22, § 3. The Fire Marshal is appointed by the Governor (G. L., c. 22, § 4).

Section 104 of Gen. St. 1919, c. 350, which created the department, is as follows: —

"The director in charge of the fire prevention division shall, under the supervision of the commissioner, perform the duties of the fire prevention commissioner for the metropolitan district, whose office is abolished hereby, and shall also have the powers and perform the duties of the district police and of the deputy chief of the detective and fire inspection department of the district police under the provisions of chapter four hundred and thirty-three of the acts of nineteen hundred and four, and acts in amendment thereof and in addition thereto, relative to the keeping and storing of inflammable fluids and combustible compounds and of the district police under the provisions of chapter thirty-two of the Revised Laws and acts in amendment thereof and in addition thereto. The said director shall submit to the commissioner rules and regulations under the said acts, and such rules and regulations shall take effect subject to the provisions of chapter three hundred and seven of the General Acts of nine-

teen hundred and seventeen, when approved by the commissioner and by the governor and council, and on such dates as they may fix."

It therefore appears that the power of making rules relative to explosives was vested in the Fire Marshal, such power to be exercised "under the supervision of the commissioner," and such rules to become effective only when "approved" by the Commissioner and the Governor and Council. That part of said section 104 which provided for the submission of rules by the Fire Marshal appears in the General Laws as section 11 of chapter 148. It is also provided in section 10 of said chapter of the General Laws that "the department" may make rules and regulations relative to explosives. This last provision is, in my opinion, not to be construed as transferring from the Fire Marshal to the Commissioner any power that the Fire Marshal had under section 104 of the 1919 act. The words "the department" in said section 10 of G. L., c. 148, mean the department through its Division of Fire Prevention. The same words as used in section 9 of the 1930 act are to be construed in the same way.

Accordingly, I answer your first question in the negative. In my opinion, the Commissioner not only is under no duty, but has no power, to make rules upon the subject in question. I think it clear that it was not contemplated that any rules on this subject should be made which are not satisfactory to the Fire Marshal.

In reference to your second question, it is plainly the duty of the Fire Marshal, at any rate in the absence of any valid and existing rules, to draw up and submit rules to the Commissioner for his approval. The act of 1930 makes this compulsory, even if it were not so under the earlier law. St. 1930, c. 399, §§ 9 and 10; *cf.* G. L., c. 148, § 10. The Fire Marshal functions "under the supervision of the commissioner." Gen. St. 1919, c. 350, § 104. (Although this provision does not appear in this express form in the General Laws, I think it clear that it was not intended by the consolidation to change the law in this respect, and the provisions which do appear in G. L., c. 22, §§ 1 and 3, namely, that the department shall be under the "supervision and control" of the Commissioner, and that the Commissioner shall be the "executive and administrative head of the department," cover the case.) If there are no rules such as are "required to be made" under the provisions of the act of 1930 (c. 399, § 10), it is clearly the duty of the Fire Marshal within a reasonable time to prepare and submit such rules, and if he does not do so he is not performing his duty.

In answer to your second question, I would say that if, in your opinion, the Fire Marshal is neglecting to perform his duty, it is your duty, as head of the department, to call that fact to his attention; and if this is insufficient, and if you are still of the same opinion, it is your duty to take some other course to compel the Fire Marshal to perform what you believe to be his duty.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Municipalities — Reimbursement for Loss of Taxes on Forest Land.

Towns are to be reimbursed for loss of taxes on lands purchased under G. L., c. 132, § 10, as amended, and such lands are not within those referred to in G. L., c. 132, § 33, as amended.

May 19, 1931.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You request my opinion as to whether St. 1931, c. 126, has the effect (1) of requiring reimbursement to towns for loss of taxes on lands heretofore acquired under section 10 of G. L., c. 132; and (2) of reducing by the amount of the land so acquired the amount authorized for acquisition under section 33 of said chapter.

(1) Under St. 1908, c. 478, which was re-enacted as section 10 of G. L., c. 132 (and further amended by St. 1921, c. 271), land has been purchased by the Commonwealth for experiment and illustration in forest management and for reforestation, subject to the provision in said statutes that the owner may redeem within ten years. By G. L., c. 58, §§ 13 *et seq.*, the Commonwealth is required to reimburse towns for loss of taxes on land owned by the Commonwealth and used for the purpose of a "state forest." It was provided by section 31 of G. L., c. 132, that lands acquired under section 30 "shall be known as state forests," and section 33 (see St. 1930, c. 274) authorized the taking and holding "for state forests" of additional lands not exceeding 150,000 acres. Hitherto no reimbursement to towns has been required in connection with land purchased under section 10, because such land is not "state forests" within the meaning of that term as fixed by the statutes above referred to. The recent statute to which you refer (St. 1931, c. 126, § 2) amends section 31 of G. L., c. 132, by inserting the following provision: —

"Lands acquired by purchase for experiment and illustration in forest management and for reforestation under the provisions of chapter four hundred and seventy-eight of the acts of nineteen hundred and eight and amendments thereof, or of the corresponding provisions of later laws, as to which the period limited for repurchase by their original owners, or their heirs or assigns, in accordance with said provisions shall have expired without such repurchase, shall also be known as state forests and shall be under the control and management of the forester to the same extent as if acquired under section thirty."

Also, section 5 of St. 1931, c. 126, provides as follows: —

"All lands acquired by the commissioner of conservation under the provisions of said chapter four hundred and seventy-eight and its amendments or of the corresponding provisions of later laws, as to which the period limited for their repurchase by their original owners, or their heirs or assigns, in accordance with said provisions has not expired, shall continue to be held and managed, subject to repurchase and reconveyance, as therein provided, but as the said period shall from time to time expire in respect to any parcel of land so acquired without repurchase and reconveyance, said parcel shall become part of the state forests and shall be subject to section thirty-one of said chapter one hundred and thirty-two, as amended by section two of this act."

Inasmuch as section 10 of G. L., c. 132, is one of the "amendments" of St. 1908, c. 478, it appears that henceforth there must be reimburse-

ments to towns in lieu of taxes on lands purchased under section 10 (or the earlier or later enactments), so far as the periods of redemption have or shall have expired, but not otherwise.

(2) As to your second question, I advise you that lands purchased under section 10 do not go to reduce the amount of 150,000 acres authorized to be acquired under section 33 (as amended by St. 1930, c. 274), because the amount so authorized by section 33 is "in addition to lands acquired under section thirty," and the lands in question were not acquired under section 30.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Board of Registration in Pharmacy — Registration — Department Store.

A portion of a department store may be registered for the transaction of a retail drug business.

MAY 20, 1931.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: You have requested my opinion on the following question of law: —

"1. The Board of Registration in Pharmacy is in receipt of an application for registration of a store for the transaction of the retail drug business, under the provisions of G. L. c. 112, § 39, from a person who desires to conduct a retail drug business in a portion of a department store which he has leased for that purpose. Is it permissible for the Board to grant such application?"

In my opinion, a designated and defined portion of a department store is a "store," within the meaning of that word as used in G. L., c. 112, § 39, and may be registered for the transaction of a retail drug business by the Board of Registration in Pharmacy.

"Store" is defined in the Century dictionary as: "A place where goods are kept for sale, either at wholesale or retail." 36 Cyc. 1328. This definition has been followed in the case of *Boston Loan Co.* v. *Boston*, 137 Mass. 332, 336, in which the court said: —

"The later statutes intend to include in the description 'shop' or 'store' any building or room used for carrying on any trade or business adapted to be carried on in a building or room, and employing a stock in trade."

In the case of *Huckins* v. *City of Boston*, 4 Cush. 543, the court, in considering whether or not the plaintiff "hired or occupied stores," considered merely the question whether or not he had in the place which he occupied goods or merchandise for sale, and did not take into consideration in its decision the fact that the plaintiff occupied only a portion of the place which the defendant contended was a store. The court in that case evidently considered the question of whether the plaintiff occupied the entire room or building or only a portion thereof immaterial in determining whether or not the plaintiff was conducting a store. See also *Commonwealth* v. *Whalen*, 131 Mass. 419.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Hunting — Foxes — Running of Hounds.

The running of foxhounds at any time of the year is not prohibited.

May 20, 1931.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You have asked my opinion as to whether the running of foxhounds between April first and the following September first of any year is lawful.

The law has established no close season with regard to foxes; that is, there is no specific prohibition in our statutes against the hunting or taking of them at any time of the year by a person licensed so to do. In view, however, of the provisions of G. L., c. 131, § 135, as added by St. 1930, c. 393, § 2, that "nothing in this chapter shall be construed to prohibit the training of hunting dogs, so called, between September first in any year and the following April first," you have raised the question of whether the running of foxhounds within the period not covered by the statute just quoted may not be prohibited by implication. In my opinion, this statute has no prohibitory force: by its terms, it sanctions the "training of hunting dogs" from September first in any year to the following April first; by implication, it indicates that elsewhere in the chapter may be found some prohibitory provision or provisions applicable to some aspects of the training of hunting dogs.

In your letter you have directed my attention to the only provisions in the chapter which have such force, namely, those provisions of G. L., c. 131, § 1, as added by St. 1930, c. 393, § 2, which define the words "hunt" and "hunting." These terms are defined in that section as including "pursuing, shooting, killing and capturing mammals and birds, and all lesser acts such as disturbing, harrying or worrying, or placing, setting, drawing or using any device commonly used to take mammals and birds, whether or not they result in taking; and . . . every attempt to take and every act of assistance to any other person in taking or attempting to take mammals and birds."

In my opinion, a person engaged solely in pursuing, shooting, killing or capturing a fox is not engaged in "hunting" such other mammals and birds as he may incidentally disturb, harry or worry. Clearly, every disturbing, harrying or worrying of a mammal or bird is not to be deemed a hunting of that creature, else the penalties of the statute might be invoked against persons who, however innocent of any intention to harm bird or beast or of any act having any connection with hunting in any ordinary sense, might inadvertently disturb one of their number. In my opinion, such disturbing, harrying or worrying of mammals and birds as the Legislature intended to be included within the definition of "hunting" referred to are such interferences of these kinds as are involved either in the direct pursuit of such creatures or in the doing of an act or part of a series of acts reasonably adapted to effectuate a taking of such creatures, whether or not such taking is or is intended to be fully consummated.

My conclusion reveals a statutory situation similar to that which existed prior to St. 1927, c. 142, repealing G. L., c. 131, § 53, which provided, in part, that —

"For the purpose of training hunting dogs which are duly licensed, no person duly licensed to hunt or trap shall be deemed guilty of a violation of the game laws forbidding the hunting or pursuing of wild birds or wild

quadrupeds by reason of the fact that he trains said dogs on said birds and quadrupeds between September first and March first, . . ."

The implication is clear that the Legislature which enacted the foregoing statute was of the opinion that, in the absence of the statute, the training of dogs *on* birds or quadrupeds might be found to be a violation even of game laws forbidding "hunting or pursuing"; but no such implication was conveyed as to training of dogs not so specifically directed against particular creatures.

To sum up: In the absence of any specific law prohibiting fox hunting, the running of foxhounds at any time of the year, whether or not in pursuit of foxes, provided they are not trained on other mammals or birds, is not contrary to law, even though while being so run they should incidentally disturb, harry or worry other creatures protected by the law from being hunted.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Metropolitan District Commission — Boston Traffic Commission — Traffic Control.

Authority of two commissions relative to traffic control on Old Colony Boulevard defined.

MAY 21, 1931.

His Excellency JOSEPH B. ELY, *Governor of the Commonwealth.*

SIR: — You have requested me to advise you as to whether the Metropolitan District Commission or the Boston Traffic Commission is responsible for traffic control at street crossings along the Old Colony Boulevard.

The Old Colony Boulevard is the name given to a highway constructed in accordance with St. 1912, c. 699, which authorized the Metropolitan Park Commission to acquire land for and to construct certain parkways or boulevards, including one such "from a point at or near the crossing of Columbia road and the New York, New Haven and Hartford railroad, to a point near Neponset bridge in Boston, and from a point near Neponset bridge in Quincy to Quincy Shore reservation at Atlantic in the city of Quincy." From the form of your question I assume that your inquiry relates to that part of the boulevard between Columbia Circle, so called, near the crossing of Columbia Road and the New York, New Haven and Hartford railroad, and Neponset Bridge.

The Metropolitan Park Commission, acting by virtue of the authority contained in the aforesaid statute and in exercise of its general powers, on December 23, 1914, made a taking of certain lands, over which it caused to be constructed the part of the Old Colony Boulevard which extends from Columbia Circle to Neponset Bridge. An examination of the order of taking, which was recorded with Suffolk Deeds, book 3856, page 241, reveals that the only way crossing the route of the boulevard, any part of which was included in the taking, was Conley Street; that is, the Metropolitan Park Commission did not take any part of the following streets at the points where they crossed the boulevard route: Freeport Street, Victory Road (formerly Preston Street), Freeport Street (at its crossing with Tenean Street), Tolman Street, Redfield Street (formerly Copley's Highway) or Walnut Street. In each of these instances the

Commission took only up to the existing way which crossed the new route, but did not take any part of the way itself. I am informed that none of these crossings has since been taken by the Metropolitan Park Commission or by the Metropolitan District Commission, which, under Gen. St. 1919, c. 350, § 123, acquired all the rights, powers, duties and obligations of the Metropolitan Park Commission, which was at the same time abolished.

By taking that part of Conley Street which crossed the route of the boulevard the Metropolitan Park Commission became vested with complete and exclusive care and control of the crossing, and became charged with the preservation of good order thereon, under St. 1894, c. 288, now incorporated substantially in G. L., c. 92, § 37, which provides that the Commission may make rules and regulations for the government and use of boulevards under its care. I refer with approval to an opinion of my predecessor in office, Honorable Herbert Parker, reported in II Op. Atty. Gen. 363, 367, relating to the effect of said St. 1894, c. 288.

I have no question but that the Metropolitan District Commission, at the crossing of Conley Street, as at any other point where one of its boulevards crosses another way and no inconsistent special arrangement for traffic control has been made by agreement with another body, has the power to erect traffic control signals which would in the ordinary course have the effect of regulating to some degree traffic on such way not under the direct control of the Metropolitan District Commission. Such exclusive control of a crossing would not violate the jurisdiction of the Boston Traffic Commission, as defined in section 2 of St. 1929, c. 263, under which the Commission was established. Said section 2 reads, in part, as follows: —

"The (Boston traffic) commission shall have exclusive authority, except as otherwise herein provided, to adopt, amend, alter and repeal rules and regulations, not inconsistent with general law as modified by this act, relative to vehicular street traffic in the city, and to the movement, stopping or standing of vehicles on, and their exclusion from, all or any streets, ways, highways, roads and parkways, under the control of the city, including rules and regulations designating any way or part thereof under said control as a through way . . . The commission shall have power to erect, make and maintain, or cause to be erected, made and maintained, traffic signs, signals, markings and other devices for the control of such traffic in the city and for informing and warning the public as to rules and regulations adopted hereunder, . . . Nothing in this act shall be construed . . . to modify or limit any power or authority of the metropolitan district commission . . ."

On the other hand, I am of opinion that the power of the Boston Traffic Commission, as given by the section just quoted, to make regulations relative to vehicular street traffic within its own jurisdiction, that is, on ways under the control of the city, is not less exclusive than the power of the Metropolitan District Commission over ways under its control. Accordingly, at the crossings along the Old Colony Boulevard mentioned, except at Conley Street, the Boston Traffic Commission has the exclusive power to control traffic; that is, to regulate the movement, stopping, or standing of vehicles on, and their exclusion from, the ways crossing the boulevard, and to erect and maintain traffic signs and signals in the exercise of this function. To be sure, the regulation of traffic

on these ways would unquestionably have the effect of modifying the movements of traffic on the boulevard by retarding from time to time its passage from the boulevard to these crossing ways; but this would involve, in my opinion, no modifying or limiting of the power or authority of the Metropolitan District Commission in the premises, which is confined to reservations and boulevards established by it.

I should have been less willingly constrained to reach the foregoing conclusion had not the Legislature apparently contemplated possible conflicts of authority in such circumstances as have raised the present question, and suggested feasible means for a harmonious resolution of the confusion. For instance, G. L., c. 92, § 86, provides for the protection and full validity of reservations and exceptions in favor of a municipality, contained in any taking of a public way by the Commonwealth for boulevard purposes in such manner that the public rights therein might otherwise be abridged. It authorizes the Commission to make grants, convey easements, enter into agreements, issue licenses, and generally conclude arrangements to effectuate such protection; but provides that no such grant, agreement, license or arrangement shall be taken or held to "abrogate or abridge the control of the commission over the land included in said taking except as in said exceptions and reservations provided, or the right of the commission to make rules and regulations for the government and use of any boulevard or crossway which may be laid out and maintained over said land or over any portion thereof, not inconsistent with such exceptions and reservations." The intimation of this statute is that a feasible procedure in the laying out and construction of a boulevard across an already existing way might consist in a taking by eminent domain of that portion common to the way and to the boulevard route, excepting such rights and interests as were not necessary to the purposes of the Commission in the construction, maintenance, and control of its project.

If such a taking is made, the Commission may exercise the exclusive police control already referred to, or, in the alternative, may avail itself of the procedure authorized in G. L., c. 92, § 87, which reads, in part, as follows: —

"The commission may transfer, for care and control, including police protection, any lands or rights or easements or interest in land held by it under section . . . thirty-five to any city, town, county, or local board of a city or town within the metropolitan parks district, with the consent of such city, town, county or board, and upon such terms and for such period as may mutually be agreed upon, and enter into an agreement with any such city, town, county or board for the joint care and control or police protection of such lands or rights therein, and also for laying out, constructing and maintaining ways into or across any such lands; . . ."

Even if no taking is made of a crossing way, control of the crossing may be exercised by the Commission alone, or jointly by the Commission and a municipality or county, provided a mutual agreement to such end can be reached in accordance with that portion of G. L., c. 92, § 87, which reads —

"Any city, town, or county, or any local board within the metropolitan parks district, may transfer, for care and control, including police protection, any land, rights, easements or interest in land in its control, although the same be already a part of a public way owned or controlled

by it, to the commission for such period and upon such terms as may mutually be agreed upon, and may enter into an agreement with the commission for the joint care and control, including police protection, of such land or public way."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Public Health — Milk — Pasteurization — Grades.

Pasteurized milk may not be sold under the designation "Grade A, Massachusetts Milk, Pasteurized."

MAY 26, 1931.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR: — You request my opinion as to whether the designation "Grade A, Massachusetts Milk, Pasteurized" may properly be applied after pasteurization to milk which before pasteurization satisfied the requirements of G. L., c. 94, § 13, for "Grade A, Massachusetts Milk."

All milk sold within the Commonwealth must comply with the Massachusetts legal standard set forth in G. L., c. 94, § 12, of a content of not less than 12 per cent of milk solids and not less than 3.35 per cent of milk fat, and must also satisfy such reasonable regulations as may have been made by the board of health of the city or town where it is sold. See G. L., c. 111, § 31.

In addition to imposing these minimum requirements the Legislature has established two special grades or classifications, known as "Grade A, Massachusetts Milk" and "Grade A Milk." Milk, to be salable, need not be of either of these grades, which merely provide means by which the producer or seller of milk which is superior to that allowed by the legal standard, in certain respects, may represent that superiority to the consumer by the appropriate designation prescribed and allowed for that grade by the statute. Besides providing for these two grades the Legislature has provided, by G. L., c. 180, §§ 22–25, inclusive, for supervision of the production and sale of certified milk, so called, by medical milk commissions.

The only one of these several categories, the limits of which are questioned by your inquiry, is the grade or classification known as "Grade A, Massachusetts Milk," which was created by Gen. St. 1917, c. 256, § 1. This act created no other grade, but contained in section 4 certain anticipatory provisions to the effect that if any grade or classification of milk other than "Grade A, Massachusetts Milk" was established, permits for the sale of such milk should be granted and might be revoked in accordance with the provisions of the act in respect to "Grade A, Massachusetts Milk." The section contained the provision, now included in G. L., c. 94, § 18, that, —

"Milk sold or kept or offered for sale or exchange under such a permit shall be marked with a label, . . . expressing the name of the grade as it is determined by the board granting the permit."

Section 5 of the same statute declared illegal the sale or possession of milk purporting to be "of a grade established hereunder" without a permit. The use of this language in the statute might be taken to indicate that the Legislature intended the act to contain, in addition to the establishment of the grade specifically designated by its terms, an authorization for the establishment of further grades without further legislative action; and an

examination of the original draft of the bill (see House No. 1965 of 1917) does, in fact, reveal an intention in the original proponent of the bill to grant, by section 1, just such authorization to the boards of health of cities and towns. Before the bill was enacted, however, this entire section 1 was stricken out, as well as certain clauses in other sections consistent with it. For example, in section 5 of the original bill the words "name of the grade as it is determined by the board establishing the grade" were changed to "name of the grade as it is determined by the board granting the permit." It is clear from these changes, in conjunction with the excision of the original section 1, that the provisions of Gen. St. 1917, c. 256, just discussed — now found in G. L., c. 94, §§ 13, 14, 15 (as amended by St. 1924, c. 310, § 2) and 18 — contain no grant of authority to any person or board to establish grades of milk other than those established by statute. The only other grade which has been established by statute is, as I have said, "Grade A Milk." Justification for the sale of "Grade A, Massachusetts Milk, Pasteurized" cannot, therefore, be based upon a conception of it as a separate grade or classification deriving its validity from a determination of a local licensing authority.

I am informed, however, that it is contended that milk designated as "Grade A, Massachusetts Milk, Pasteurized" may properly be sold, not as a separate grade but under a permit authorizing the sale of "Grade A, Massachusetts Milk," since there is no express prohibition in the statute against the pasteurization of "Grade A, Massachusetts Milk." This contention loses sight of the fact that the point at issue is not whether "Grade A, Massachusetts Milk" may be pasteurized, but whether, if it is pasteurized, it continues to be "Grade A, Massachusetts Milk," such as may be sold under a permit for that grade.

The qualifications for "Grade A, Massachusetts Milk," found in G. L., c. 94, § 13, are that such milk be produced within this Commonwealth under cleanly conditions, and that —

"in its raw state the bacteria count shall not average more than one hundred thousand per cubic centimeter, upon examination of five samples taken one each day, and each from a different lot of milk, on five consecutive days. When sold, kept or offered for sale or exchange, such milk shall be designated and marked by a label, cap or tag bearing the words 'Grade A, Massachusetts Milk' in plain, legible, bold-faced type."

In the first place, the words "in its raw state" are not indicative of a legislative expectation that the milk as "Grade A, Massachusetts Milk" might be found in some other state, such as a state of pasteurization. The plain meaning of the words "in its raw state," as used in their context, is that the Legislature intended that the bacteria count for the grade was not to be attained by pasteurization but must exist in the milk in its raw state.

Secondly, I find in the statutory provisions relating to the subject an intention to protect the consumer of milk by ensuring, so far as possible, that milk bearing a special designation, indicating a grade superior to milk which merely meets the legal standard, shall satisfy the qualifications for that grade when, and whenever, it is offered for sale or exchange.

Section 14 of G. L., c. 94, provides, in part: —

"The board of health of a town, upon application of a person desiring to sell or exchange milk therein as 'Grade A, Massachusetts Milk', shall test, as provided in the preceding section, the milk produced or to be sold or exchanged by such applicant, and if upon such test the milk so pro-

duced or to be sold or exchanged by the applicant is found to comply with the requirements of 'Grade A, Massachusetts Milk', such board shall issue without charge to the applicant a written permit to keep for sale, exchange or delivery, or to sell, exchange or deliver in such town, milk graded, designated and labelled under the preceding section as 'Grade A, Massachusetts Milk'. . . ."

Section 18 of the same chapter provides: —

"Whoever himself or by his agent sells, exposes for sale, or has in his custody or possession with intent to sell, milk purporting to be of a grade established under section thirteen . . . without having a permit so to do . . . shall be punished . . . by a fine . . ."

It is clear from these provisions that any person, whether producer or dealer, who sells milk purporting to be "Grade A, Massachusetts Milk" without a permit to sell the same becomes subject to the penalty provided by the statute. He likewise becomes subject to the penalty if, having a permit, he sells milk purporting to be of this grade which is not wholly produced within the Commonwealth (§ 18). In addition to these penalties, as for criminal offenses, it is provided by section 14 that "a permit . . . may be revoked at any time upon written notice to the holder by the board issuing it, if milk offered by the holder for sale or exchange as so graded does not comply with said section" (§ 13). Revocation of the permit is the only penalty provided for the selling of graded milk having an illegally high bacteria count.

A consideration of all these provisions together reveals an intention on the part of the Legislature that any person selling milk purporting to be "Grade A, Massachusetts Milk" must not only meet the requirements of section 13 to the satisfaction of the board of health to which he makes application for a permit, at the time that such board makes the test required upon his application by section 14, but must at all times thereafter, while offering the milk for sale or exchange, maintain these requirements at peril of losing his permit under section 14. If it were sufficient that the milk should have complied with section 13 only at some stage in its production and not at all times while offered for sale or exchange as graded under section 13, the statute would not achieve the manifest intention of the Legislature to ensure that milk so graded, at the time when it reaches the consumer, shall comply with the specified requirements which distinguish its special classification. Since pasteurized milk cannot, by its very nature, furnish a basis for an inspection as to the bacteria count of milk in its raw state, I am of the opinion that no pasteurized milk can properly be sold or offered for sale or exchange under a permit to sell "Grade A, Massachusetts Milk," and that if it is so sold or offered the permit of the person so selling or offering may be revoked, under the provisions of section 14.

Pasteurized milk may be sold, of course, but not as milk of a grade which, as I have shown, the Legislature did not intend to include as a pasteurized product. It may be sold as ungraded milk, or, if of sufficient fat content and otherwise meeting the requirements established by the Department of Public Health under authority of the Legislature, as given by St. 1924, c. 310, as "Grade A Milk." This grade, although similar in designation to "Grade A, Massachusetts Milk," is different in many respects, one of which is the requirement that it be pasteurized.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Civil Service — Veterans — Labor Service — Cities.

Former employees in the labor service of a city, specifically mentioned in St. 1931, c. 319, as being entitled to preference in employment, are to have such preference over veterans.

May 28, 1931.

Hon. Paul E. Tierney, *Commissioner of Civil Service.*

Dear Sir: — You have requested my opinion as to whether the men named in St. 1931, c. 319, are entitled to preference for employment in the labor service of the city of Cambridge over veterans, as mentioned in G. L., c. 31, § 24.

G. L., c. 31, § 24, provides, in part, as follows: —

"A veteran who registers for employment in the labor service of the commonwealth and of the cities and towns thereof, if found qualified, shall be placed on the eligible list for the class for which he registers ahead of all other applicants. The names of eligible veterans shall be certified for labor service in preference to other persons eligible according to the method of certification prescribed by the civil service rules applying to civilians."

St. 1931, c. 319, provides that certain named individuals, "former employees in the labor service of the city of Cambridge, who were removed therefrom in the year nineteen hundred and twenty-eight by order of the division of civil service, by reason of the fact that certain classification requirements under the civil service law were not complied with, shall, if duly registered as applicants for employment in the labor service of said city, be given preference for re-employment therein."

The nature of a civil service list has been described in an opinion rendered by one of my predecessors in office as follows (VI Op. Atty. Gen. 598, 599–600): —

"A place upon an established list ensures neither absolute nor relative rank, but is, on the contrary, held in continuing competition not only with those who in subsequent examinations achieve better competitive marks, but also with those to whom the Legislature accords a valid preference by law."

In my opinion, the Legislature, by St. 1931, c. 319, has accorded to the individuals named therein, if duly registered as applicants, a valid preference by law over all other applicants for employment in the labor service of the city of Cambridge, including veterans. St. 1931, c. 319, discloses that the individuals named therein were removed from actual employment because of circumstances in no way attributable to any act or omission on their part. It was the evident desire of the Legislature that in so far as possible these twenty-four named individuals should be restored to their former positions. To this end the act provided that they "be given preference for re-employment." This preference, so created by the Legislature, constitutes a preference for employment over all persons whose names are or may be placed on any eligible list for the labor service of this particular city, whether or not the names of such persons, because they are veterans, are "placed above the names of all other applicants" on such list.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Medical Examiner — Board of Health — Removal of a Dead Body.

A medical examiner has no authority, under G. L., c. 38, § 6, to order the removal of a dead body from the town where it lies, without a permit from the local board of health.

June 1, 1931.

Hon. Frederic W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — You have asked my opinion upon the following question: —

"Has a medical examiner authority to order the removal of a body from one city or town to another city or town before a permit for such removal has been issued by the board of health where the death occurred?"

I answer your question in the negative.

Under date of January 27, 1930, you requested my opinion on the following question: —

"Has the medical examiner, under the provisions of G. L., c. 38, § 6, which provides that 'he shall forthwith go to the place where the body lies and take charge of the same,' authority to order the removal of a body from the place where the body lies to another town within his county, without the permit required by G. L., c. 114, § 45?"

That question I answered in the negative in my opinion of February 8, 1930 (Attorney General's Report, 1930, p. 50). The reasons for my opinion as then given are set forth at length therein, and the same are applicable to the question which you now ask. Moreover, the provisions of G. L., c. 114, § 45, as amended, which I quote in part, preclude me from expressing any other than an opinion answering your question in the negative. G. L., c. 114, § 45, is as follows: —

" . . . no undertaker or other person shall bury or otherwise dispose of a human body in a town, or remove therefrom a human body which has not been buried, until he has received a permit from the board of health or its agent appointed to issue such permits, or if there is no such board, from the clerk of the town where the person died; . . . No such permit shall be issued until there shall have been delivered to such board, agent or clerk, as the case may be, a satisfactory written statement containing the facts required by law to be returned and recorded, which shall be accompanied, in case of an original interment, by a satisfactory certificate of the attending physician, if any, . . . If death is caused by violence, the medical examiner shall make such certificate . . . The board of health or its agent, upon receipt of such statement and certificate, shall forthwith countersign it and transmit it to the clerk of the town for registration. . . . "

Very truly yours,
Joseph E. Warner, *Attorney General.*

Contract — Construction — Delivery of Power.

A contract for the delivery of steam and electricity by Harvard College to the Commonwealth construed.

June 2, 1931.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have requested my opinion as to the construction of certain clauses of an agreement between the President and Fellows of

Harvard College and the Commonwealth relating to the furnishing of steam, electricity and compressed air to the Massachusetts School of Art. The agreement provides for the delivery of the power by the college to steam mains, electric mains and pipe lines of the Commonwealth from a generating plant on the medical school property. Your question is whether, under the terms of the agreement, the Commonwealth is obligated to pay the whole or any part of the expenses incurred in connecting the generating plant and steam and electric mains of the college, as they existed at the time of the making of the agreement, with the conduits of the Commonwealth at the property line of the college in Binney Street in Boston.

It is part of the contention of counsel for the college that the provisions relating to the delivery of steam and electricity to the mains of the Commonwealth at the property line of the college in Binney Street (in particular, section 1 of article III and section 1 of article VI) have "no direct bearing on the payment for the connection built on the College property." I am of the opinion that these provisions, read in connection with the rest of the agreement, support my conclusion that it was not contemplated that the Commonwealth should pay for any connections on the college property, although the absence of liability on the Commonwealth for the charges in question can be based upon other grounds.

Section 1 of article III of the agreement provides that: —

"The steam to be furnished by the College to the Commonwealth hereunder shall be delivered to the steam mains of the Commonwealth at the property line of the College in Binney Street, Boston, and the College shall have no responsibility for the transmission of the steam so delivered beyond the point where said steam mains cross said property line."

Section 2 provides that: —

"The Commonwealth shall construct . . . and . . . maintain and operate such tunnels, conduits, steam supply pipe lines and condensate return lines as may be necessary to obtain the steam from the steam mains of the College, and to return the condensate to the said steam mains."

It is contended by the college that the steam mains thus referred to as those from which the steam was to be obtained and to which the condensate was to be returned by the lines of the Commonwealth "naturally and necessarily were the mains existing at the date of the contract." The contention that this conclusion must follow from the language of the said section 2, on the theory that the words "the steam mains of the College" were not appropriate to designate mains not then existing, appears unsound in view of the use of the identical phrase in section 1 in reference to "the steam mains of the Commonwealth at the property line of the College in Binney Street," which, I am advised, were likewise not in existence at the time of the execution of the contract. Also, in the corresponding provisions of article VI, section 2, relating to electric power, a similar phrase was employed to designate such electric mains of the college as were clearly not then in existence, namely: "The Commonwealth shall construct . . . such conduits . . . etc., as may be necessary to obtain electricity at the delivery point from the electric mains of the College." It follows, therefore, that neither section 2 of article III

nor section 2 of article VI contains any undertaking on the part of the Commonwealth to construct or to pay for any installation on college property.

It is noteworthy that in providing in article IV for the installation of steam meters, which were to be on college property and to be and remain the property of the college, the drafters of the agreement recognized that in the absence of specific provision no implication would arise that the Commonwealth was to share in the cost. Accordingly, since such was the intention of the parties, it was specifically provided in said article IV that "the cost thereof (should) be divided equally between the parties thereto." It would seem clear that if there had been a similar intention to divide the cost, or to impose upon the Commonwealth the whole cost, of much more extensive construction and installation on the property of the college, the agreement would have incorporated such intention in its terms.

It was further specifically provided in said article IV that the records of the meters should at all times be accessible to the Commonwealth, as well as to the college, for checking and copying. No similar license is granted by the agreement to the Commonwealth to enter upon lands of the college for the maintenance and operation of tunnels, conduits, and supply and return lines on the property of the college, which would further indicate that the mains so to be maintained and operated were solely those not on property of the college, thus necessitating a construction of the words "steam mains of the College," in section 2, that would include mains constructed after the execution of the agreement up to the property line.

It is to be noted, also, that under the terms of section 1 of article III the responsibility of the college for the transmission of steam was to end at the property line. By section 2 the Commonwealth became obligated to maintain and operate the necessary supply and return lines to obtain steam from the mains of the college and to return the condensate to the same. To hold that the mains of the college thus referred to were only those in existence at the time of the making of the agreement would appear to be inconsistent with the undertaking of the college to be responsible for the transmission of steam up to the property line.

The provisions relating to electric service, some of which I have referred to, are substantially similar to those relating to steam service, in the respects which are material to the question. My conclusion is, accordingly, the same as to the cost of both the steam and electric conduits and mains.

To sum up briefly: The college has agreed to deliver steam and electricity to the mains of the Commonwealth at the property line in Binney Street, but the Commonwealth has not undertaken to bear any part of the cost of whatever mains and conduits may have had to be constructed on college property to enable it to carry out its undertaking.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Municipalities — Taking — Use of Water.

Neither the Fourteenth Amendment to the Constitution of the United States nor article X of the Declaration of Rights can be invoked to prevent a legislative change in existing laws which affects rights to the use of water under a contract made between two municipalities.

June 10, 1931.

Hon. Leverett Saltonstall, *Speaker of the House of Representatives.*

Dear Sir: — You ask my opinion as to whether a bill, entitled "An Act relative to the supplying of water to the town of Southampton by the city of Holyoke," would, if enacted into law, be constitutional.

The bill, if enacted, would amend St. 1896, c. 419 (an act to authorize the city of Holyoke to increase its water supply), by striking out section 5 and inserting a new section in place thereof.

St. 1896, c. 419, § 1, authorized the city of Holyoke, for the purpose of supplying its inhabitants with pure water for the extinguishment of fires and for domestic and other purposes, to "take by purchase or otherwise and hold the waters of the southwesterly branch of the Manhan river, at any point on said river not more than three thousand feet below the confluence of the Tucker and Manhan brooks, in the town of Southampton, also the waters of Tucker and Manhan brooks and the springs connected therewith, and the water rights connected with such waters, and also all lands, rights of way and easements necessary for holding and preserving such water and for diverting and conducting the same into Ashley's and Wright's ponds, so-called, in said city of Holyoke, and also for conducting the same to any and all parts of said city." Section 5 of said St. 1896, c. 419, provided as follows: —

"The city of Holyoke shall, when constructing its pipe line through the town of Southampton, place a Y branch in said pipe line, not less than eight inches in diameter, at its own expense, at such point as may be designated by the selectmen of said town. If at any time thereafter the town of Southampton shall vote to construct a system of water works said town may connect its pipes with that of the city of Holyoke at the Y branch herein provided for, and draw from the pipe of the city of Holyoke, without expense to said town, such quantity of water as may be required by said town to supply its inhabitants with water for fire, domestic, and other purposes, except power, not exceeding one hundred and twenty-five gallons per day for each inhabitant."

Said proposed bill provides that the following section be inserted in St. 1896, c. 419, in place of section 5 thereof: —

"If at any time hereafter the town of Southampton shall vote to construct a system of water works the said town, for the purpose of supplying its inhabitants with water for fire, domestic and other purposes, except power, may connect its pipes with that of the city of Holyoke at a point in the town of Southampton designated by the selectmen of said town at the time of laying said pipe, and may draw free from the said pipe, without expense to the town, water to a quantity not exceeding gallons per day for each resident of premises supplied with water by said town, the total actual quantity to be so supplied free to Southampton by the said city not to exceed million gallons. The said

town shall pay to said city for all water used in excess of million gallons annually at such rate and under such terms and conditions as shall be agreed upon by the boards of water commissioners of the municipalities concerned, and in default of said agreement the rate, terms and conditions shall be determined by the board of public utilities."

The General Court, in consideration of the rights and powers granted to the city of Holyoke by St. 1896, c. 419, imposed the conditions (in § 5 thereof) that "when constructing its pipe line through the town of Southampton" the said city should "place a Y branch in said pipe line, not less than eight inches in diameter, at its own expense, at such point as may be designated by the selectmen of said town," and that "if at any time thereafter the town of Southampton shall vote to construct a system of water works said town may connect its pipes . . . and draw . . . such quantity of water as may be required by said town . . . not exceeding one hundred and twenty-five gallons per day for each inhabitant." The city of Holyoke did construct a water system by virtue of the rights and powers conferred upon it by said St. 1896, c. 419, and did place a Y branch in its pipe line in said town of Southampton, in the place designated by the selectmen of said town, for the purpose of supplying water to the inhabitants of said town in the event that it should vote to construct a system of water works.

The town of Southampton, at its last annual town meeting, unanimously voted "to accept the water supply committee's report and authorize the selectmen to petition the General Court for permission and authority to borrow money and issue bonds to an amount not exceeding sixty thousand (60,000) dollars for the purpose of installing a water supply system." As a result of said vote a petition was filed with the General Court for such authority, and St. 1931, c. 339, was passed, authorizing the town of Southampton to make the desired loans and construct the proposed water supply system.

The proposed bill was filed upon petition of the water commissioners of the city of Holyoke subsequent to the adoption of said vote by the town of Southampton. In effect, said proposed bill seeks to alter the amount of water which the town of Southampton may take, without expense, from the Y branch in the water system so constructed by the city of Holyoke.

It is contended by the town of Southampton that St. 1896, c. 419, § 5, in view of the facts set forth above, constitutes a valid and binding contract, and that the proposed bill is unconstitutional in so far as it attempts to impair the obligations of said contract. U. S. Const., art. I, § 10. It is further contended by said town that the effect of St. 1896, c. 419, § 5, was to vest in the town of Southampton the right to take a certain definite quantity of water from so much of the water supply system of Holyoke as was constructed by said city under the authority of said chapter 419; that this right became the property of the town of Southampton in its private or proprietary capacity; and that the proposed bill effects a deprivation of property of the town without due process of law and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

It is well established that any act of the Legislature which would affect the contract or property rights of any private citizen or private corporation in the same manner as this bill affects the rights of the town of Southampton would be in violation of the contract clause and the Fourteenth Amendment to the Constitution of the United States. *Woodward* v.

Dartmouth College, 4 Wheat. 518; *Boston & Lowell R.R. Corp.* v. *Salem & Lowell R.R. Co.*, 2 Gray, 1.

It is also clear that, inasmuch as the contract or property rights of the town of Southampton arising by virtue of St. 1896, c. 419, § 5, relate to the ownership and conduct of a water supply system, they are held by said town in its strictly proprietary capacity. *Woods* v. *Woburn*, 220 Mass. 416, 421; *Pearl* v. *Revere*, 219 Mass. 604, and cases there cited.

It is also settled that the power of the Legislature, unrestrained by the contract clause or the Fourteenth Amendment to the Constitution of the United States, over the rights and property of municipalities held and used for "governmental purposes" cannot be questioned. *Worcester* v. *Worcester Consol. St. Ry. Co.*, 196 U. S. 539; *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509.

The question presented, therefore, resolves itself to a determination of whether municipalities, holding contract or property rights in their proprietary capacity, are entitled to the same protection against impairment of the obligation of such contract rights or deprivation of such property rights by subsequent acts of the Legislature as is guaranteed to individuals or private corporations by the contract clause and the Fourteenth Amendment to the Constitution of the United States.

The earlier decisions of the courts of many jurisdictions, including the Supreme Judicial Court of Massachusetts, held that municipalities are entitled to the protection of the contract clause and the Fourteenth Amendment to the Constitution of the United States as against subsequent legislative acts impairing the obligations of their contracts and depriving them of property rights granted, made or held by them in their private or proprietary capacity. This question was before the Supreme Judicial Court of this Commonwealth in the case of *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509. In that case, the matter before the court for decision was whether St. 1889, c. 265, which directed the transfer by the city of Boston of property held by it for cemetery purposes to a private corporation created by virtue of said act, was constitutional. In holding said act unconstitutional, the court said (pp. 513–519): —

"In the case before us, we have to determine whether the title of the city of Boston to the Mount Hope Cemetery is subject to legislative control, and this involves an inquiry to some extent into the usages and laws in this Commonwealth relating to burying grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded or have acted merely as agencies of the State government.

. . . . . .

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States so that the Legislature has no power to require its transfer without compensation. Const. of Mass., Dec. of Rights, Art. X. Const. of U. S., Fourteenth Amendment."

In the case of *Spaulding* v. *Andover*, 54 N. H. 38, the facts were as follows: The Legislature of New Hampshire, by Laws of 1870, c. 12, and Laws of 1871, c. 3, had granted to the towns of that State the proceeds of certain bonds "to be devoted exclusively toward the reimbursement of the expenditures incurred by the town for war purposes during the

rebellion," and subsequently, by Laws of 1872, c. 26, had declared a portion of the proceeds of said bonds, which had been assigned to the town of Andover under the provisions of the Laws of 1870 and 1871, to "belong to and be the property of" certain individuals (those, namely, who, having been counted as part of the quota of the town, never received any bounty from the town). In holding chapter 26 of the Laws of 1872 unconstitutional, the Supreme Court of New Hampshire said (pp. 55–56): —

"In its public character, the municipal corporation is subjected to the absolute control of state legislation, subject only to exceptional constitutional limitation. 'In its proprietary or private character,' says Judge Dillon, 'the theory is, that the powers of the legislature are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the particular corporation, as a distinct *legal personality;* and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quoad hoc,* a private corporation, or, at least, not public, in the sense that the power of the legislature over it is omnipotent.' Dillon Mun. Corp., sec. 39.

. . . . . .

A constitutional act of legislation, which is equivalent to a contract, and is perfected, requiring nothing further to be done in order to its entire completion, is a contract executed. Whatever rights are thereby created, a subsequent legislature cannot impair. If the proviso, condition, or limitation, enacted in 1872, had been engrafted upon or made a part of the reimbursement act, it would have been binding, and the town would take the benefits of the act, perhaps, with its burdens. Potter's Dwarris on Statutes 477.

. . . . . .

The law of 1872, declaring a portion of the fund which had been solemnly granted to the town of Andover to belong to and be the property of certain individuals, is invalid, as being contrary to that provision of the Federal constitution, art. 1, sec. 10, which declares that no state shall pass any law impairing the obligation of contracts."

In the case of *State ex rel. White* v. *Barker,* 116 Iowa, 96, 57 L. R. A. 244, the facts were as follows: The Legislature of the State of Iowa had "passed acts creating a board of waterworks trustees for cities of the first class, and authorizing the appointment of such board by the district court of the county in which such cities are located." Sioux City, prior to the passage of said act, "owned and operated its waterworks system." "The mayor (of Sioux City) made application to the district court of Woodbury county for the appointment of a board of trustees for the system, under the provisions of the acts of the legislature hitherto mentioned," said trustees to take over the management of said water works system; and the District Court did appoint trustees upon said application. The Supreme Court of Iowa held that the act of the Legislature was unconstitutional, and that the trustees appointed by the District Court were unlawfully holding said positions and performing any duties thereunder. In its decision the court said (p. 251): —

"We have already called attention to the dual nature of municipal corporations, and have discovered that with respect to private and pro-

prietary rights and interests they are entitled to constitutional protection. It is quite clear that the establishment and control of waterworks for the benefit of the inhabitants of the city is a matter that pertains to the municipality, as distinguished from the state at large.

. . . . . .

Having, then, a proprietary and private interest in its waterworks system, granted to it by the legislature, or incident to its power to acquire and hold property, the question recurs. May the management and control of this property be taken out of its hands by the legislature, and invested in trustees appointed by the district court; especially where, as in this case, the trustees so appointed are in no respect responsible to the appointing power, and are not required to make reports thereto? We think not. If the city were a mere private corporation, it would need no argument to show that the legislature could not take the management of its property out of the hands of its officers and directors, and place it in the custody and control of officials, even if they be stockholders, selected by persons who had no interest in the corporate entity, and who were in no manner responsible to those interested in the welfare of the organization. Such devestiture of property, or, what is the same thing, of its management and control, would be unconstitutional and void. The same rules have been applied to property held by a municipal corporation in its private and proprietary capacity."

To the same effect, see *Grogan* v. *San Francisco*, 18 Cal. 590; *Town of Milwaukee* v. *City of Milwaukee*, 12 Wis. 93; *Ellerman* v. *McMains*, 30 La. Ann. 190.

The earlier decisions of courts of many jurisdictions, other than those cited above, hold that municipalities are not entitled to the protection of the contract clause or the Fourteenth Amendment to the Constitution of the United States against subsequent legislative acts impairing the obligations of their contracts and depriving them of their property rights granted, made or held by them, either in their governmental or proprietary capacity.

In *Darlington* v. *Mayor of the City of New York*, 31 N. Y. 164, the court entered into an exhaustive consideration and discussion of the law pertaining to the power of the Legislature in regard to the rights and property of a municipality (pp. 193–196): —

"City corporations are emanations of the supreme law making power of the State, and they are established for the more convenient government of the people within their limits. In this respect, corporations chartered by the crown of England, and confirmed at the revolution, stand on the same footing with similar corporations created by the legislature. Their boards of aldermen and councilmen and other officers are as truly public officers as the boards of supervisors, or the sheriffs and clerks of counties; and the property intrusted to their care and management is as essentially public property as that confided to the administration of similar official agencies in counties and towns. In cities, for reasons partly technical, and in part founded upon motives of convenience, the title is vested in the corporate body. It is not thereby shielded from the control of the legislature, as the supreme law making power of the State. Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one, I think, can

doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to some municipal or other public purpose, within the city, as a court house, a hospital, or the like; and yet, if the argument on behalf of the defendants is sound, it would be the taking of private property for public use without compensation, and the act would be void.

. . . . . .

In the case of *Woodward* v. *Dartmouth College* (4 Wheat., 518), the particular question was, whether the legislature of the State of New Hampshire was warranted in passing certain statutes, altering, in many important particulars, the charter of the corporation of Dartmouth College, and assuming to regulate the execution of its corporate franchises according to its views of public expediency. It was claimed by the college that this legislation was prohibited by the provision of the Constitution of the United States declaring the inviolability of contracts; and the answer to that claim was, that the college was a public institution of the State of New Hampshire, and hence subject to the control of the law making power of that State. The main question, therefore, was, whether it was a private or public corporation. The judgment was, that, although it was, in a limited sense, public, as an artificial being existing by virtue of the laws, and in this respect partook of the public character which belongs to all corporations; yet, when looking to the power of the State, it was to be regarded as a private corporation, such as a bank or manufacturing company. It is not important to point out the manner in which this conclusion was reached, as the case is here referred to only with a view to the distinction between the two classes of corporations and the authority of the legislature over them respectively. On behalf of the State of New Hampshire, it was argued that the prohibitory provision of the Constitution should not be understood to comprehend the political relations between the government and its citizens; or offices held within the State for State purposes; or those laws concerning civil institutions which was said might change with circumstances, and be modified by act of the legislature. Chief Justice Marshall said, that the general correctness of these positions could not be doubted; and he added, 'that if the act of incorporation be a grant of political power; if it create a civil institution to be employed in the administration of the government; or if the funds of the college be public property; or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its powers imposed by the Constitution of the United States.' But he held that, so far from this, the college was a private eleemosynary institution, the body corporate possessing the whole legal and equitable interest, and possessing civil rights which were protected by the Constitution. Mr. Justice Washington said, 'that there were two kinds of corporations aggregate, viz., such as were for public government, and others of a private character.' 'The first,' he said, 'are those for the government of towns, cities, or the like, and, being for public advantage, are to be governed according to the laws of the land.' These, he said, were mere creatures of public institution, created exclusively for public advantage. It would seem reasonable, he proceeds to say, that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interference

cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it; the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the corporation. (Story's Com. on the Const., § 1, p. 387; 2 Kent Com., p. 275.) The expression of Chancellor Kent, in the Commentaries, that where a municipal corporation is empowered to have and hold private property, such property is invested with the security of other private rights, is understood to mean only that it possesses such rights against wrongdoers, and not that it is exempted from legislative control. These trustees or governors have no rights, interests, privileges or immunities which are violated by such interference."

In the case of *Trustees of Schools* v. *Tatman*, 13 Ill. 27, the facts were as follows: The Legislature had passed an act directing the sale of a ferry franchise which it was alleged had been previously granted to the plaintiffs as officers of a school district. In holding this act constitutional, the court said (p. 30): —

"Franchises are creatures of the sovereign power, which it may grant or refuse at pleasure. Even if a franchise to keep a ferry on the sixteenth section had been granted to the trustees, it was competent for the legislature to revoke it. A grant of this character to a public corporation, may, at any time, be resumed by the State. It is not like the case of the grant of a franchise to an individual, or a private corporation. Public corporations are but parts of the machinery employed in carrying on the affairs of the State; and they are subject to be changed, modified, or destroyed, as the exigencies of the public may demand."

In the case of *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, the facts are as follows: The Legislature of the State of Connecticut had abrogated a franchise to maintain a ferry across the Connecticut River, which it had previously granted to the municipalities of Hartford and East Hartford. In declaring the act constitutional, the United States Supreme Court said (p. 534): —

"The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the legislature."

To the same effect, see *State of Maryland* v. *Baltimore & Ohio R.R. Co.*, 3 How. 534; *St. Louis* v. *Shields*, 52 Mo. 351; *Board of Education* v. *Aberdeen*, 56 Miss. 518.

In the recent case of *Woods* v. *Woburn*, 220 Mass. 416 (1915), the question of the constitutionality of a legislative act which impaired the contract rights of a municipality acting within its proprietary capacity was again discussed by the Supreme Judicial Court. In that case the court did not expressly hold that such act was unconstitutional, as in the case of *Mount Hope Cemetery* v. *Boston, supra,* but merely stated that "there would be grave doubt as to (its) constitutionality under the Fourteenth Amendment to the Constitution of the United States," and that the municipality "probably is entitled to all the protections" of the Constitutions of the United States and of this Commonwealth. The court said (p. 421): —

"There would be grave doubt as to the constitutionality under the Fourteenth Amendment to the Constitution of the United States of any statute which should undertake to annul such a contract as that here

under consideration. The city of Woburn owns and manages its system of water supply as a private commercial venture. *Pearl* v. *Revere,* 219 Mass. 604, and cases there collected. A city or town doubtless owns property acquired for and devoted to a water supply in its strictly proprietary capacity. *Mount Hope Cemetery* v. *Boston,* 158 Mass. 509, 519. *Higginson* v. *Treasurer & School House Commissioners of Boston,* 212 Mass. 583. *Worcester* v. *Worcester Consolidated Street Railway,* 196 U. S. 539. It thus probably is entitled to all the protections as to inviolability of its contracts undertaken in this connection which a private individual possesses under the Fourteenth Amendment, and can invoke its shield against legislation aimed to impair their validity. It cannot be presumed in the absence of plain language to that effect that the Legislature would raise so serious a constitutional question by the enactment of any statute. But, without determining the constitutional question, as a matter of construction it must be held that none of the statutes enacted during the life of this contract applied to or affected it."

The precise question at issue in this inquiry, namely, whether or not the contract clause and the Fourteenth Amendment to the Constitution of the United States prevent a State, through its Legislature, from enacting laws which impair the obligations of a contract to which a municipality is a party, or which deprive a municipality of property held in its proprietary capacity, was decided by the Supreme Court of the United States in the recent case of *City of Trenton* v. *State of New Jersey* (May 7, 1923), 262 U. S. 182. In that case the facts were as follows: The city of Trenton, as successor to a grant made by the State of New Jersey to a private corporation, conferring on said private corporation a perpetual right, unburdened by license fee or other charge, to divert all the water that might be required for the use of the said city or its inhabitants from the Delaware River, claimed the same rights possessed by its predecessor, and asserted that a subsequent act of the Legislature of New Jersey, imposing a charge for water diverted in excess of a *per capita* maximum prescribed by said act, was unconstitutional in that it offended against the contract clause of the Constitution of the United States and took property owned by the said city, in its private or proprietary capacity, for public use without just compensation and without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. The court held that the city could not invoke the contract clause or the Fourteenth Amendment, even assuming that the private corporation, its predecessor in title, might have done so if its rights had not passed to the city; that the power of a State over the rights and property of municipalities, whether held and used for governmental purposes or in a private or proprietary capacity, is unrestrained by the contract clause or the Fourteenth Amendment to the Constitution of the United States; and that said contract clause and the Fourteenth Amendment imposed no constitutional restraints against the State in favor of its own municipality, even though it is acting as an organization to care for purely local needs in a private or proprietary capacity.

In its opinion the court cited with approval the case of *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 524, in which it was held: —

"Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or

their existence upon any thing like a contract between themselves and the legislature of the State, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with every thing partaking of the nature of compact."

In specifically discussing the distinction between a municipality acting in its governmental capacity and a municipality acting in its proprietary capacity, and in holding that such distinction furnished no grounds for the application of constitutional restraints, the court said (p. 191): —

"The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris* v. *District of Columbia*, 256 U. S. 650 and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view of former opinions of this Court, no substantial federal question is presented. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, *supra*, and cases cited."

The decision in the case of *City of Trenton* v. *New Jersey*, 262 U. S. 182, has been followed in numerous decisions of that court and of other courts, and the principle enunciated therein has been reaffirmed. See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, 25; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 390; *Railroad Commission* v. *Los Angeles Ry. Corp.*, 280 U. S. 145, 156.

A further contention has been raised that this bill constitutes a deprivation of property rights of the town of Southampton held by it in its proprietary capacity, and that such deprivation is in violation of the Constitution of Massachusetts (Declaration of Rights, art. X).

The Supreme Judicial Court of Massachusetts has held in many cases that the rights and privileges conferred by the Constitution of Massachusetts are substantially the same as those conferred by the Fourteenth Amendment to the Constitution of the United States.

In the case of *Commonwealth* v. *Strauss*, 191 Mass. 545, the defendant contended that the statute in question was "in conflict with the Fourteenth Amendment of the Constitution of the United States" and "in conflict with articles 1 and 10 of the Declaration of Rights in the Constitution of Massachusetts." In its decision in that case the court said: —

"The rights relied upon under the Fourteenth Amendment to the Constitution of the United States, and under the Declaration of Rights in the Constitution of Massachusetts, are substantially the same, namely, the right of every person to his life, liberty and property, including freedom to use his faculties in all lawful ways, 'to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.'"

In the case of *Nelson* v. *Blinn*, 197 Mass. 279, the court, in discussing the provisions of article X of the Declaration of Rights in the Constitution of Massachusetts and the Fourteenth Amendment to the Constitution of the United States, said: —

"The appellant relies upon art. 10 of the Declaration of Rights, which guarantees to every individual protection in the enjoyment of his life, liberty and property, and upon the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law. As applied to a case like the present, the prohibition in the amendment just referred to is as broad as the general provision in the Constitution of Massachusetts."

See also *Mount Hope Cemetery* v. *Boston, supra; Hyde* v. *Boston & Worcester St. Ry. Co.*, 194 Mass. 80; *Attorney General* v. *Provident Institution for Savings*, 201 Mass. 23; *Durgin* v. *Minot*, 203 Mass. 26.

It is therefore settled by decisions of the Supreme Judicial Court of this Commonwealth that the provisions of the Fourteenth Amendment to the Constitution of the United States and article X of the Declaration of Rights in the Constitution of Massachusetts are substantially similar with respect to the protection accorded against the deprivation of property without compensation. The decision of the Supreme Court of the United States in the case of *City of Trenton* v. *New Jersey* definitely established the principle that a municipality holding property in its private or proprietary capacity may not invoke the provisions of the Fourteenth Amendment to the Constitution of the United States as against the State. This results in a conflict of judicial opinion between the court of last resort of the United States and the Supreme Judicial Court of this Commonwealth. In so far as said conflict relates to the construction of the Constitution of the United States, the decisions of the Supreme Judicial Court of Massachusetts are no longer controlling. It would seem, in order that the construction and interpretation of similar constitutional provisions in the Constitution of the United States and in the Constitution of Massachusetts may be harmonious and consistent, that the Supreme Judicial Court, should the question again be presented

to it for determination, must hold that the provisions of article X of the Declaration of Rights accord to a municipality holding property in its proprietary capacity no further rights or protection than is accorded to such municipality by the provisions of the Fourteenth Amendment to the Constitution of the United States.

In my opinion, the proposed bill would be constitutional if enacted into law.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Auditor of the Commonwealth — Duties.

The duties of the Auditor of the Commonwealth are to be fixed by the Legislature.

Accounts of an institution which does not belong to the Commonwealth may not be audited.

The Auditor has no authority to perform work which is not properly comprehended by the verb "to audit."

The word "activities," as used in G. L., c. 11, § 12, is limited to units of the Commonwealth's service.

The accounts of the Auditor's department are subject to scrutiny by the Governor and Council, and the Auditor is subject to written regulations made by them.

JUNE 10, 1931.

Hon. FRANCIS X. HURLEY, *Auditor of the Commonwealth.*

DEAR SIR: — You have asked my opinion upon seven questions relating to your duties as Auditor.

"1. Whether or not the legislation of 1923 (St. 1923, c. 362), which purported to take away many of the powers of the Auditor's office, is constitutional."

The position of Auditor was originally created by an act of the Legislature, St. 1849, c. 56. The office was provided for by Mass. Const. Amend. XVII, ratified in 1855. The qualifications for the office and the manner of election thereto were prescribed by the said article of amendment, and subsequently by Mass. Const. Amend. LXIV. With the exception of a provision for the Auditor's succession to discharge the duties of the Governor and Lieutenant-Governor when both of such offices are vacant (Mass. Const. Amend. LV), the Auditor's powers and duties are not prescribed by the Constitution.

The Legislature, accordingly, may establish such powers and duties and may from time to time add to or subtract therefrom, so long as it does not alter the qualifications for the office or the manner of election thereto or the provision for succession. And the Legislature has so dealt with the office through a long series of enactments since the adoption of Mass. Const. Amend. XVII, ratified in 1855.

The provisions of St. 1923, c. 362, which took away certain powers and duties previously vested by the Legislature in the Auditor or his department, do not appear, in so far as they dealt with such powers and duties, to have so exceeded the authority of the General Court in this respect that they can be said to be unconstitutional.

"2. Are there any duties of the office other than those set forth in St. 1923, c. 362, § 16?"

Inasmuch as the duties of the Auditor have been left undefined and unenumerated by the framers of the constitutional amendments referred to, he is not required to perform any duties which have not been laid upon him by the Legislature. The Legislature, by the provisions of G. L., c. 11, § 12, as amended by St. 1923, c. 362, § 16, has provided for the performance of duties appropriate to his office. Authority to perform other services can be derived only from other legislative enactments granting it.

"3. Under the 1923 legislation, which provides that the State Auditor shall annually make a careful audit of all departments, offices, commissions, institutions and activities of the Commonwealth, is it a duty of this office to audit the accounts of institutions like the Soldiers' Home in Chelsea, to which, I believe, the Commonwealth gives money each year?"

G. L., c. 11, § 12, as amended by St. 1923, c. 362, § 16, reads as follows: —

"The department of the state auditor shall annually make a careful audit of the accounts of all departments, offices, commissions, institutions and activities of the commonwealth, including those of the income tax division of the department of corporations and taxation, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such accounts at reasonable times and said department may require the production of books, documents and vouchers, except tax returns, relating to any matter within the scope of such audit. The accounts of the last named department shall be subject at any time to such examination as the governor and council or the general court may order. Said department shall comply with any written regulations, consistent with law, relative to its duties made by the governor and council. This section shall not apply to the accounts of state officers which the director of accounts of the department of corporations and taxation is required by law to examine. The department of the state auditor shall keep no books or records except records of audits made by it, and its annual report shall relate only to such audits."

It is specified by said statute that the accounts which are to be audited are those of "departments, offices, commissions, institutions and activities *of the Commonwealth*." The accounts of an institution which is not an institution of the Commonwealth itself nor of any of its departments are not to be examined. An audit may be made of money which "the Commonwealth gives," as you state, showing the disbursement of the same by the officials of the Commonwealth and its receipt by the properly accredited beneficiary, but such a practice may not be enlarged so as to cover an audit of the accounts of the beneficiary.

"4. Does the provision that the Auditor shall annually make a careful audit of the accounts of the institutions and activities of the Commonwealth carry with it the power to make a complete and independent investigation of conditions which might be disclosed in the course of an examination of the accounts?"

I answer this question in the negative. Authority to audit, as the word "audit" is ordinarily used and as it is employed in G. L., c. 11, § 12, as amended, does not import "power to make a complete and independent investigation of conditions which might be disclosed in the course of an examination of the accounts."

"5. What is the exact scope of the word 'activities' as used in the above-mentioned legislation?"

As the word "activities" is employed in the context of G. L., c. 11, § 12, as amended, it is limited to divisions or units of the Commonwealth's service expending or receiving moneys, of a like kind, though not necessarily included within the governmental subdivisions set forth in the same sentence immediately before it.

"6. In the legislation of 1923 there is a sentence which reads, 'The accounts of the last named department shall be subject,' etc. What, in your opinion, did the Legislature mean by the words 'last named department?'"

The department referred to is the Department of the State Auditor. His department is the last named. The words immediately before the sentence containing the words "the accounts of the last named department" read, "and for said purpose the authorized officers and employees of *said department of the state auditor* shall have access to such accounts at reasonable times and *said department* may require the production of books, documents and vouchers, except tax returns, relating to any matter within the scope of such audit."

"7. There is a sentence following the one above mentioned, which reads, 'Said department shall comply,' etc. What department, in your opinion, was meant in this sentence?"

The department referred to is the Department of the State Auditor. The words "said department" follow immediately upon the sentence above referred to, which begins, "The accounts of the last named department."

I am confirmed in my opinion that the words "last named department" and "said department," specified in this and the foregoing question, refer to the Department of the State Auditor by the fact that section 12 of G. L., c. 11, before the amendment of 1923, by its language made it perfectly clear that the Auditor's accounts were to be subject to an examination at the direction of the Governor and Council and that the Auditor was to comply with regulations of the Governor and Council. Although the Auditor is excused by the last sentence of said section 12, in its amended form, from keeping books or records, nevertheless it is apparent that the intent of the Legislature was that the Auditor's accounts should still be subject to scrutiny and that he should still be liable to regulation by the Governor and Council as much after the amendment as before. The meaning of the words in question is not so plain in their embodiment in the context of the section as amended; but their meaning is clearly seen if we read them in connection with the section as it stood before amendment, the word "he" therein referring, by reference to the preceding section, as it then stood, to the State Auditor. Said section 12 of G. L., c. 11, before amendment was as follows: —

"He shall annually examine the books, accounts and vouchers of the state treasurer. He shall at least once in each year, and oftener in his discretion, audit the accounts of all state departments, officers, commissions and institutions receiving money to be paid to the commonwealth. *His own books and accounts shall be subject at any time to such examination as the governor and council or the general court may order. He shall*

comply with any written regulations, consistent with law, relative to the duties of his office made by the governor and council. This section shall not apply to the accounts of state officers which the director of accounts of the department of corporations and taxation is required by law to examine."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement — Period of Service — Veteran.

Under G. L., c. 32, § 57, as amended, a veteran who has been in the service of a city may add the period of such service to the period of service for the Commonwealth, in computing the total period which will render him eligible to retirement.

JUNE 13, 1931.

His Excellency JOSEPH B. ELY, *Governor of the Commonwealth.*

SIR: — Your Excellency has asked my opinion "as to whether or not a certain veteran employed in the Department of State Aid and Pensions is eligible for retirement under the provisions of G. L., c. 32, § 57."

G. L., c. 32, § 57, as amended by St. 1923, c. 386, to which you refer, controls the matter. This section reads as follows: —

"A veteran who has been in the service of the commonwealth, or of any county, city, town or district thereof, for a total period of ten years, may, upon petition to the retiring authority, be retired, in the discretion of said authority, from active sevice, at one half the regular rate of compensation paid to him at the time of retirement, and payable from the same source, if he is found by said authority to have become incapacitated for active service; provided, that he has a total income, from all sources, exclusive of such retirement allowance and of any sum received from the government of the United States as a pension for war service, not exceeding five hundred dollars."

From the statute it will be seen that the payment of the pension lies in the discretion of the retiring authority, who in this instance is yourself, as specified by section 59 of said chapter 32. Before such discretion can be exercised in favor of the claimant the existence of certain conditions must be found, as a matter of fact, to exist, namely: (1) That the claimant is a veteran who has been in the service of the Commonwealth, or of any county, city, town or district thereof, for a total period of ten years; (2) that the claimant has become incapacitated for active service; and (3) that he has a total income, as specified in section 57, of not exceeding $500.

The Attorney General does not pass upon questions of fact. These are for Your Excellency's determination.

From the papers which were transmitted to me it would appear that the veteran seeking retirement had been in the service of the city of Peabody from March 23, 1921, to April 29, 1925, and in the service of the Commonwealth from March 24, 1925, to the date of his petition. The statute contemplates that service for the city may be added to service for the Commonwealth, to complete the total period of ten years of designated service, which is a necessary condition for receipt of the pension. Various certificates furnished by the veteran appear to show the existence of the other conditions which entitle him to a pension. But the

weight to be given to this or any other evidence which may be submitted to you upon this point, and the ultimate conclusion to be based thereon, as well as the finding which may be made, rest with Your Excellency.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

South Metropolitan Sewerage District — Town of Weymouth — Acceptance of Statute by Town.

The town of Weymouth is a member of the South Metropolitan Sewerage District by virtue of its acceptance of St. 1930, c. 419, at a town meeting, irrespective of the subsequent action of the voters of the town upon a referendum, so called, thereon.

JUNE 24, 1931.

Hon. DAVIS B. KENISTON, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You ask my opinion whether "the town of Weymouth is now a member of the South Metropolitan Sewerage District," as provided by St. 1930, c. 419, entitled "An Act providing for the admission of the town of Weymouth to the South Metropolitan Sewerage District."

Under the provisions of St. 1930, c. 419, the territory of the town of Weymouth was admitted to the South Metropolitan Sewerage District, as defined in G. L., c. 92, § 1, and acts in amendment thereof and in addition thereto, subject to acceptance of said act as provided in section 6 thereof. Section 6 provides as follows: —

"This act shall take effect upon its acceptance by a majority of the town meeting members of the town of Weymouth present and voting thereon at a meeting legally called for the purpose, not later than May first, nineteen hundred and thirty-one."

The return of the town clerk of Weymouth to the Secretary of the Commonwealth, dated March 30, 1931, as required by G. L., c. 4, § 5, reads as follows: —

"At the annual town meeting of the town of Weymouth, held on March 2, 1931 and by a legal adjournment to the 4th of said month, as provided for in the annual warrant, and all provisions of law having been complied with, a legal quorum being present, under article 31 of the warrant, reading as follows:

'To see if the town will accept chapter 419 of the Acts of 1930.'

Passed by a vote of 122 voting in the affirmative and 24 in the negative, this vote was taken by a roll call of the town meeting members, present and voting.

On March 10, 1931 a petition being signed by 153 voters of the town of which I as clerk of the board of registrars have certified that 148 names appear as voters of the town, was presented to the selectmen of the town, praying that this question be submitted to the voters at large, under the provisions of section 8 of chapter 61 of the Acts of 1921. The board of selectmen has voted to call a special meeting of the voters of the town to vote on this question, said meeting to be held on April 13, 1931."

A subsequent communication to the Secretary of the Commonwealth from the town clerk of Weymouth, dated April 14, 1931, reads as follows: —

"At a special town meeting of the inhabitants of the town of Weymouth, held on April 13, 1931, under a warrant duly signed by the selectmen of said town, all provisions of law having been complied with, and held under the provisions of section 8 of chapter 61 of the Acts of 1921, upon the question:

'Shall the town accept chapter 419 of the Acts of 1930?'

The result of the vote was —

Yes	781
No	1,852
Blanks	1"

The language of St. 1930, c. 419, § 6, quoted above, is clear. There can be no doubt of its meaning and of the intention of the Legislature, as therein expressed, that the effectiveness of the act depended solely upon the action of the "town meeting members of the town of Weymouth present and voting thereon at a meeting legally called for the purpose." There is no reservation or limitation on their action in this respect in the statute. Any action of the town meeting members thereon, affirmative or negative, was to be final. The condition precedent to the effectiveness of the act, imposed by the Legislature, was executed when the town meeting members of the town of Weymouth, at a meeting legally called for that purpose, took the action set forth in the return of the town clerk referred to above. The town of Weymouth became a member of the South Metropolitan Sewerage District at that time.

It is claimed that the subsequent action of the voters of the town of Weymouth, as set forth in the communication received by the Secretary of the Commonwealth from the town clerk on April 14, 1931, hereinbefore referred to, nullifies the acceptance of the act by the town meeting members by virtue of the provisions of St. 1921, c. 61, §§ 5 and 8, which are as follows: —

"Section 5. The articles in the warrant for every town meeting, so far as they relate to the election of town officers, and town meeting members, as hereinbefore provided, referenda, and all matters to be acted upon and determined by ballot, shall be so acted upon and determined by the voters of the town in their respective precincts. All other articles in the warrant for any town meeting shall be acted upon and determined exclusively by town meeting members at a meeting to be held at such time and place as shall be set forth by the selectmen in the warrant for the meeting, subject to the referendum provided for by section eight.

. . . . . .

Section 8. No measure passed at any representative town meeting, except a vote to adjourn or a measure appropriating or borrowing money for emergency purposes which shall contain a preamble specifying the facts constituting the emergency and requiring for its passage a separate vote of two thirds of the town meeting members present and voting thereon, shall become operative until after the expiration of five days, exclusive of Sundays and holidays, from the dissolution of the meeting. If, within said five days a petition, signed by not less than one hundred voters of the town, containing their names and addresses as appearing on the voting list is filed with the selectmen asking that the question or questions involved in such measure be submitted to the voters of the town at large, then the selectmen, after the expiration of five days, shall forthwith call a special meeting for the sole purpose of presenting to the voters

at large the question or questions so involved. The polls shall be opened at two o'clock in the afternoon and shall be closed not earlier than eight o'clock in the evening and all votes upon any questions submitted shall be taken by ballot, and a check list shall be used in the several precincts in the same manner as in the election of town officers. The questions submitted at the said town meeting shall be determined by vote of a majority of the voters at large voting thereon. The questions so submitted shall be stated upon the ballot in the same language and form in which they were stated when presented to said representative town meeting by the moderator, and as they appear upon the records of said representative town meeting. If such petition be not filed within the said period of five days, the vote in the representative town meeting shall become operative and effective upon the expiration of said period."

These provisions were not applicable to said St. 1930, c. 419. The vote of the town meeting members on the acceptance of said St. 1930, c. 419, was not a "measure," within the meaning of that word as used in section 8. As therein used, that word must be construed to mean those things which the town, acting by its town meeting members, may do under the general powers vested in towns, and such other votes of the town meeting members on any question under special laws which specifically provide for such referenda. The vote of the town meeting members on the acceptance of the act was not a proceeding under the general powers vested in towns; nor does it appear in said act, expressly or by implication, that final action upon the acceptance thereof was sought by the operation of the referendum provisions of St. 1921, c. 61.

In my opinion, therefore, the town of Weymouth is now a member of the South Metropolitan Sewerage District.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Settlement — Domicil — Aid.

The acquisition of a settlement cannot be predicated upon presence as a patient at a hospital in a particular city.

JUNE 29, 1931.

Hon. RICHARD K. CONANT, *Commissioner of Public Welfare.*

DEAR SIR: — You request my opinion in regard to the legal settlement of Joseph P. Connors upon the basis of the following facts: —

"Has Joseph P. Connors a legal settlement? He was born in Nova Scotia in 1884 and had a legal settlement in Boston July 5, 1921, when he removed to Brookline with his wife and children. His wife has received aid, under the provisions of the General Laws, from the board of public welfare of Brookline since April 1, 1925. Mr. Connors has been supported by the city of Boston at its City Hospital, at public expense, during the following periods of time: November 11, 1924, to March 16, 1925; March 11, 1926, to April 6, 1926; September 8, 1927, to April 9, 1928."

The statutory provisions pertinent to your inquiry are G. L., c. 116, § 5, as most recently amended by St. 1926, c. 292, and as affected by St. 1927, c. 203, § 3. The provisions of said G. L., c. 116, § 5, are, in part, as follows: —

"Except as otherwise provided in this section, each settlement existing on August twelfth, nineteen hundred and eleven, shall continue in force until defeated under this chapter, but from and after said date failure for five consecutive years by a person, after reaching twenty-one years of age, to reside in a town where he had a settlement, shall defeat a settlement acquired under clause first of section one, . . . The time during which a person shall be an inmate of any almshouse, jail, prison, or other public or state institution, within the commonwealth or in any manner under its care and direction, or that of an officer thereof, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or defeating a settlement, except as provided in section two. . . ."

A legal settlement in a city or town, once acquired, can be defeated in two ways: (1) by the acquisition of a new settlement; and (2) by the "failure for five consecutive years . . . to reside in a town where he had a settlement." Connors acquired no new settlement in Brookline because he has been receiving aid continually since April 1, 1925, and "no person shall acquire a settlement, or be in process of acquiring a settlement, while receiving relief as a pauper, unless, within two years after receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth or to the town furnishing it." G. L., c. 116, § 2, as most recently amended by St. 1928, c. 155, § 9.

The sole question at issue, therefore, is whether Connors' legal settlement in Boston was defeated by his failure to reside in Boston for five consecutive years. The word "reside," as used in statutes relative to settlement in this Commonwealth, means domicil. *Stoughton* v. *Cambridge*, 165 Mass. 251; *Worcester* v. *Wilbraham*, 13 Gray, 586; *Wilbraham* v. *Ludlow*, 99 Mass. 587, 591; *Whately* v. *Hatfield*, 196 Mass. 393.

In the case of *Whately* v. *Hatfield*, *supra*, it was said: —

"It often has been decided in the construction of our statutes relating to the settlement of paupers, and of those relating to taxation, that residence for either purpose includes something more than mere physical presence. There must be on the part of the pauper, and of the taxpayer, the settled intention of choosing his place of residence with the object of making it his home."

If Connors has failed to reside in Boston for five consecutive years, his legal settlement in Boston has been defeated; and if he "by such absence (failure to reside) fails to acquire a settlement elsewhere, that circumstance is immaterial. The statute must be construed in accordance with the intention of the Legislature as therein expressed." *Lanesborough* v. *Ludlow*, 250 Mass. 99, 102.

Connors has resided in Brookline since July 5, 1921. He has thus failed to reside in Boston since that date. It cannot be said that his presence in the City Hospital at Boston constituted a residence in this city so as to interrupt the continuity of his failure to reside in Boston, as it cannot be claimed that his presence there was with "the settled intention of choosing" the City Hospital as "his place of residence with the object of making it his home." The only consideration to be accorded to this period of time during which he was a patient at this institution is that it should "not be counted in computing the time . . . for . . . defeating a settlement." G. L., c. 116, § 5, as amended. Connors, therefore, ceased to have a legal settlement in Boston upon the expiration of

the period of five years next succeeding the date he failed to reside in Boston, deducting from this computation the periods of time during which he was an inmate of the Boston City Hospital. As he has not during this period acquired a legal settlement in Brookline, he has no legal settlement in the Commonwealth at the present time.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Inspector of Apiaries — Right of Entry — Records.

The Inspector of Apiaries has no right of forcible entry to a place where bees are kept.

Records kept by the Inspector of Apiaries, under G. L., c. 128, § 37, are open to the inspection of the public.

JULY 9, 1931.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR: — 1. You have written me in relation to the Inspector of Apiaries as follows: —

"The occasion has . . . arisen where an inspector has been refused admittance to a place where bees are kept. Before proceeding to disregard the protest of the landowner and enter upon the premises, your opinion is requested as to the rights of the Commonwealth in an instance of this kind."

G. L., c. 128, § 36, provides: —

"The inspector and his assistants shall have access to each place where bees, bee products or supplies or appliances used in apiaries are kept."

The terms of this section, however, do not give to the said inspector a right of forcible entry for the purpose of gaining access to the place mentioned in the section. Section 38 of said chapter 128 provides: —

"Whoever violates any provision of sections thirty-two to thirty-six, inclusive, shall be punished for the first offence by a fine of not more than ten dollars, for the second offence by a fine of not more than twenty-five dollars and for a subsequent offence by a fine of not more than fifty dollars."

It would appear from the language of section 38, read in connection with section 36, that it was the intention of the General Court to make it an offence to prevent access by the inspector, as provided for in section 36. Consequently, where such access is intentionally prevented, a criminal complaint under section 38 should be made in an appropriate district court against the person or persons who have so prevented the inspector from having the access designated by section 36.

2. You have also written me as follows: —

"A request has been made by a beekeeper to this department for permission to examine our records of apiary inspection. Your opinion is requested as to whether records of this kind are public records and open to indiscriminate inspection by any person desiring to review them. Has the Department of Agriculture authority to exercise discretion, and possibly restriction, in so far as this type of record, which deals with the number and location of diseased colonies of bees, is subject to examination

by persons, unless adequate reason is given relative to the need and use of such information?"

G. L., c. 128, § 37, provides: —

"The inspector shall keep a detailed record of the number and location of all apiaries visited by him or his assistants, the number and location of all colonies found diseased, the treatment thereof, and the expenditure incurred in the performance of the duties of his office. He shall report to the commissioner annually, and at such other times as he requests."

G. L., c. 4, § 7, cl. 26th, as amended, defines "public records," in part, as follows: —

" 'Public records' shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, city or town which is the property thereof, and in or on which any entry has been made or is required to be made by law, . . . "

By G. L., c. 128, § 37, the Inspector of Apiaries is required to keep a detailed record of certain definite things. There is no specific term of the statute which tends to show that such record is not to be open to the public. Such record, when placed upon paper, becomes a public record, under the foregoing definition of G. L., c. 4, § 7, cl. 26th, as amended, which embodies the general substance of the earlier definition contained in R. L., c. 35, § 5.

G. L., c. 66, § 10, provides: —

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee. In towns such inspection and furnishing of copies may be regulated by ordinance or by-law."

Accordingly, it is the duty of the person having custody of the record made by the Inspector of Apiaries under G. L., c. 128, § 37, to permit the public to have access to it. Reports by the inspector relative to any other matters than those specifically enumerated in said section 37 are not such as he is required by law to make a record of, and are therefore not "public records" open to general inspection. If the inspector's records are contained only on cards, such as the sample which you sent me, the public are entitled to see such cards.

The facts which you have placed before me differ from those which were before certain of my predecessors in office, upon which they based opinions dealing with specific instances of papers and documents in connection with the status of such papers and documents as "public records." See VII Op. Atty. Gen. 8, and citations there noted. With such opinions I am in agreement; but in the instant matter I am constrained to advise you that the records to which you have directed my attention are "public records."

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Division on the Necessaries of Life — Necessaries — Commodities —Ice Cream.

Ice cream may be a commodity which is a necessary of life, so that circumstances affecting the prices charged for it may be the subject of investigation by the Division on the Necessaries of Life.

July 10, 1931.

Mr. Herbert P. Wasgatt, *Acting Commissioner of Labor and Industries.*

Dear Sir: — You have requested my opinion "as to whether or not the Division on the Necessaries of Life has authority under sections 9E, 9F, and 9G of G. L., c. 23 (inserted by St. 1930, c. 410, § 3), to give hearings, to administer oaths, direct the attendance and testimony of witnesses and the production of books and documents and other papers relating to the charges made for ice cream."

G. L., c. 23, as amended by St. 1930, c. 410, § 3, to which you direct my attention, provides, in part, with relation to the Division on the Necessaries of Life, as follows: —

"Section 9E. The division shall study and investigate the circumstances affecting the prices of fuel, gasoline and refined petroleum products and other *commodities which are necessaries of life.*"

The Attorney General does not pass upon questions of fact.

In an opinion by former Attorney General Jay R. Benton, VII Op. Atty. Gen. 244, in which I concur, the question of what commodities may, as matter of law, be deemed "necessaries of life" is considered at length, and the history of various enactments similar to the instant statute is reviewed. Without doubt "food" is a necessary of life. Ice cream is certainly a form of food, made from ingredients which are themselves food. This is a matter of common knowledge, as is also the fact that the consumption of ice cream is so widespread throughout the Commonwealth that in its more common forms, at least, it can scarcely be termed a luxury. It is not necessary for me to express an opinion as to whether or not all articles of food are to be considered as "commodities which are necessaries of life," within the meaning of said G. L., c. 23, § 9E; but for the purpose of aiding you in determining as a fact whether or not ice cream is one of such commodities, which determination of fact is to be made by you, I advise you that, as a matter of law, ice cream may be a commodity which is a necessary of life, so as to make "the circumstances affecting the prices" charged for it a proper subject for study and investigation by the Division on the Necessaries of Life, under said section 9E. It follows that with relation to such study and investigation, if it be determined as a fact that ice cream is a necessary of life, the authority given to the said Division by G. L., c. 23, §§ 9F and 9G, may be exercised.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Probation Officers — Compensation — County Accounts.

A probation officer's salary may be increased by the Superior Court although at the time of such increase there was a deficit in the appropriation to which the salary was chargeable.

July 30, 1931.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You have asked my opinion upon the following questions: —

"1. Under G. L., c. 35, §§ 44–47, inclusive, can the Division of Accounts of this department approve the accounts of a county treasurer which show the payment of an increase in salary for an individual, which increase was granted at a time when there was an actual deficit in the appropriation to which this salary was chargeable? This question arises in the case of a probation officer appointed under G. L., c. 276, § 83.

2. If this individual has been retired under the provisions of G. L., c. 32, §§ 75 and 76, between January 1st and the date on which an appropriation has been granted by the General Court (G. L., c. 35, § 34), can an increase be granted, after an appropriation has been made, which shall be retroactive and which will affect his retirement allowance?"

I am advised that the probation officer to whom you refer and whose salary payment is now before you for consideration is a probation officer appointed by the Superior Court, and I confine myself to expressing an opinion in the premises solely upon such a probation officer, and do not attempt to answer your question in so far as it might appear to relate to probation officers appointed by inferior courts.

As to the second question contained in your letter, I am informed that it is a purely hypothetical inquiry relating to no subject now before you for action, and, in accordance with the long-accepted practice of this department, I make no answer thereto.

Probation officers are appointed under the provisions of G. L., c. 276, § 83, which are as follows: —

"The superior court, the chief justice of the municipal court of the city of Boston, subject to the approval of the associate justices thereof, and the justice of each other district court and of the Boston juvenile court may appoint such male and female probation officers as they may respectively from time to time deem necessary for their respective courts; and if there is more than one probation officer in one court, one of such officers may be designated as chief probation officer. All officers so appointed shall hold office during the pleasure of the court making the appointment. The compensation of each probation officer appointed by the superior court shall be fixed by that court and by it apportioned from time to time among the counties wherein said officer performs his duties. In the municipal court of the city of Boston the chief justice of said court, subject to the approval of the associate justices thereof, and in other district courts and the Boston juvenile court, the justice thereof, shall fix the compensation of each probation officer appointed for such court, which compensation shall be subject to approval by the county commissioners and shall be paid by the county on vouchers approved respectively by the chief justice of the municipal court of the city of Boston or by the justice of such other district or juvenile courts."

It might be thought that the appointment of probation officers by the Superior Court and the payment of their salaries were prohibited by G. L., c. 35, §§ 32–34, inclusive, relating to county expenditures, which specifically provide as follows: —

"Section 32. No county expenditure shall be made or liability incurred, nor shall a bill be paid for any purpose, in excess of the appropriation therefor, except as provided in the two following sections and in section fourteen.

Section 33. If the appropriation for any purpose is insufficient to meet an expenditure required by law, the treasurer may, on the order of the county commissioners, pay the same from any money in the treasury. The commissioners shall place on their records a statement of all such payments with the reasons in detail therefor, and shall report fully and specifically thereon in their next annual report.

Section 34. After December thirty-first and before the regular appropriations have been made by the general court, the county commissioners and other officers authorized to incur liabilities payable by the county may incur liability at a rate of expenditure not in excess of that authorized for the same purpose for the preceding year, but not exceeding one half the last annual appropriation therefor. Payments therefor may be made from any unappropriated balance in the county treasury, to be charged to the regular annual appropriation when made. No new or unusual expense shall be incurred or permanent contract made, or salary increased until an appropriation sufficient therefor has been made by the general court."

In my opinion, however, the authority given by G. L., c. 276, § 83, to the Superior Court to appoint and to fix the salaries of probation officers is not limited by the terms of G. L., c. 35, §§ 32–34, inclusive, nor is it controlled by any other statutory provision.

The history of legislation with respect to probation officers in the Superior Court shows that the Legislature intended to confer upon the court the power to appoint probation officers, to fix their compensation and to apportion such compensation among the counties where the officers perform their duties, with the sound discretion of the court as the only limitation upon its authority. Furthermore, that portion of G. L., c. 35, § 34, referring to "new and unusual" expenses, which it might be suggested limits the power of the Superior Court in appointing probation officers, first appears in St. 1897, c. 128, § 2, whereas the power to appoint probation officers was first conferred upon the Superior Court by St. 1898, c. 511. It is not probable that the Legislature intended the subsequent statute to be limited by the prior one.

Inasmuch as the Superior Court has been given by statutory provision this authority, which is an exercise of a judicial function (*Catheron* v. *County of Suffolk*, 227 Mass. 598), to fix the compensation of probation officers, the expenditure with respect to such compensation is one "required by law," as those words are used in G. L., c. 35, § 33. It is significant, as indicating a similar legislative interpretation of G. L., c. 276, § 83, to the effect that compensation of probation officers is an expenditure "required by law," within the meaning of those words as used in G. L., c. 35, § 33, that, in the enactment of an amendment to said chapter 35 by St. 1930, c. 400, § 5 (G. L., c. 35, § 56), classifying county salaries, offices and positions, the office of probation officer (among certain other designated offices,

the salaries for which offices, with the exceptions of a single group, are created by statute and the payments of which salaries are plainly "required by law") is exempted from classification by the County Classification Board.

I am therefore of the opinion that the Division of Accounts can approve the payment by a county treasurer of an increase in salary for a probation officer of the Superior Court, although such increase was granted at a time when there was an actual deficit in the appropriation to which this salary was chargeable.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Election — Workmen's Compensation.

The Board of Retirement may retire an employee when the fact of his permanent incapacity has been established, if he has not exercised an election to take workmen's compensation therefor; and if there has been no such election the employee need not, as a condition of such retirement, refund payments received under workmen's compensation.

JULY 31, 1931.

Hon. CHARLES F. HURLEY, *Chairman, Board of Retirement.*

DEAR SIR: — You request my opinion on the following set of facts: —

"On November 4, 1922, a member of the Retirement Association, working as a fireman and night watchman, fell off a stepladder and broke his ankle, and was paid workmen's compensation covering a period from November 14, 1922, to April 19, 1923, at $16 per week, $360, and in addition his hospital and medical expenses were paid. The employee agreed to the discontinuance of the compensation on the aforesaid date, and he was reinstated in the State service until compensation was renewed by agreement, covering a period from November 22, 1929, to December 23, 1929, four and four-sevenths weeks at $16, $73.14, and he was again reinstated in the State service for less than one year. He has now applied to the Board for retirement for permanent incapacity, under G. L., c. 32, § 2 (9), as amended."

Your questions are as follows: —

"1. May the Board retire the employee in the case cited above when the fact has been established that he is permanently incapacitated as a result of the injury in 1922?

2. Has a person while receiving payments of workmen's compensation any right to apply for retirement for permanent disability, provided he makes his application within two years from the date his name last appeared upon the pay roll?

3. If a person has a right under question 2, and the Board of Retirement determines he may be retired for permanent incapacity, is the person required to refund the compensation previously paid or must he simply sign an agreement to discontinuance of compensation before pension payments may be made to him?"

The law applicable to this set of facts is to be found in G. L., c. 32, § 2 (9), as amended, and § 2 (11); also in G. L., c. 152, § 73. These sections are as follows: —

G. L., c. 32, § 2 (9) and (11): —

"(9) Any member who is found by the board, after examination by one or more physicians selected by the board, to have been permanently incapacitated, mentally or physically, by injuries sustained through no fault of his own while in the actual performance of his duty, from the further performance of such duty, may be retired, irrespective of age and of his period of service, and shall receive yearly payments as follows: (*a*) an annuity at his age nearest birthday, as provided by section five (*2*) *B;* (*b*) such a pension from the commonwealth that the sum of the annuity under section five (*2*) *B* (*a*) and the pension shall equal one half the annual salary received by him at the time when the injury was received. Except as otherwise provided, a person retired under this paragraph shall not receive from the commonwealth any other sum by way of annuity, pension or compensation. In case of emergency, a retired officer or inspector of the department of public safety or a retired permanent member of the metropolitan district police may be called upon by the proper authority for such temporary active duty as such officer or inspector is able to perform, and there shall be paid to him for such service the difference between the rate of full pay and the rate of pension received by him. Application for disability retirement hereunder shall be made in writing within two years after the date of the applicant's last salary payment, and pension and annuity payments granted under this paragraph shall be payable only from the date of receipt by the board of such application. The board may require re-examinations from time to time of any member of the association pensioned under this paragraph or under paragraph (8), and if the disability or incapacity is found no longer to exist the pension shall cease and there shall be refunded to such member such sum, if any, as the board finds then remaining to his credit in the annuity fund.

. . . . . .

(11) The word 'injuries', as used in paragraphs (9) and (10) of this section, shall mean any injury which is a natural and proximate result of an accident occurring in the performance and within the scope of duty and without fault of the member. The board may employ special examiners whenever, in its judgment, it is necessary to assist in determining the degree of disability under paragraph (8) or (9) of this section. The fee of each such examiner, not exceeding ten dollars in amount in any one case, shall be paid by the commonwealth. The decision of the board on the question of disability and retirement under said paragraph (8) or (9) shall be final. Payments under paragraph (10) shall not be made as of a date earlier than that of the receipt by the board of written application therefor, except that payments to a child of a deceased member shall date from the date as of which payments to his widow shall terminate."

G. L., c. 152, § 73: —

"Any person entitled to receive compensation as provided by section sixty-nine from the commonwealth or from such county, city, town or district, who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both. If a person entitled to such compensation from the commonwealth or from such county, city, town or district receives by special act a pension for the same injury, he shall forfeit all claim for compensation; and any compensation received by him or paid by the

commonwealth or by such county, city, town or district which employs him for medical or hospital services rendered to him may be recovered back in an action at law. No further payment shall be awarded by vote or otherwise to any person who has claimed and received compensation under sections sixty-nine to seventy-five, inclusive."

Under the provisions of law quoted above, the Board may retire any employee, provided (1) the Board finds that the employee is permanently incapacitated, mentally or physically, from the further performance of his duty, and that such permanent incapacity is the proximate result of injury sustained through no fault of his own, while in the actual performance of his duty; (2) application for such disability retirement is made in writing within two years after the date of the applicant's last salary payment; and (3) the employee has not, prior to the date of such application, exercised an election to receive compensation on account of permanent disability, under the provisions of G. L., c. 152.

Payment of compensation to an employee under the provisions of G. L., c. 152, is material to the determinations of the Retirement Board only in so far as it may be construed as an election to receive such payment in lieu of pension. It is usual for the Industrial Accident Board, in the course of its determination of the amount of compensation award, to make a specific finding of fact as to whether the incapacity is total or partial. See G. L., c. 152, §§ 34 and 35. If the findings of fact of the Industrial Accident Board are such that they should be construed as determining that the employee is permanently incapacitated from the further performance of his duty, and the employee accepts compensation under such award and findings, this fact must be held to be an election to receive such compensation in lieu of pension, and, consequently, a waiver of his right to receive a pension under the provisions of G. L., c. 32. If the findings of the Industrial Accident Board do not constitute a determination that the employee is permanently incapacitated from the further performance of his duty, the receipt of compensation by the employee has no effect upon his rights under G. L., c. 32, § 2 (9).

In my opinion, therefore, the answer to your first question is in the affirmative; the answer to your second question is in the affirmative unless the receipt of payments of workmen's compensation must be construed as an election to receive such payments in lieu of pension, as outlined above; and the answer to your third question is that the employee need not refund the compensation previously paid before pension payments may be made to him.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Registrar of Motor Vehicles — Fireman's Special License — Revocation.

It is mandatory upon the Registrar of Motor Vehicles to revoke a fireman's special license if he is the holder of another license as well, which has been revoked after conviction for operating while under the influence of intoxicating liquor.

JULY 31, 1931.

Hon. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion upon the following question of law: —

"Is it mandatory for the Registrar to revoke the special license of a

fireman, as well as to revoke the ordinary license issued by the Registrar, upon a conviction for driving while under the influence of liquor."

G. L., c. 90, § 24, as amended, provides in its pertinent parts as follows: —

"Whoever upon any way, or in any place to which the public has a right of access, operates a motor vehicle recklessly, or while under the influence of intoxicating liquor, . . . shall be punished by a fine . . . or by imprisonment . . . A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and *shall*, unless the court or magistrate recommends otherwise, *revoke immediately the license of the person so convicted*, . . . The registrar in his discretion may issue a new license to any person acquitted in the appellate court, . . . provided, that no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction . . ."

G. L., c. 90, § 8, as amended, provides, with relation to license to operate motor vehicles, as follows: —

"Application for license to operate motor vehicles may be made by any person; . . . A person to whom a license to operate motor vehicles has been issued, unless such license contains a special limitation or restriction, may operate any registered motor vehicle. *Special licenses shall be issued to operators of motor-propelled fire apparatus who are members of a municipal fire department.* . . ."

G. L., c. 90, § 10, as amended, provides in part: —

"No person shall operate a motor vehicle upon any way unless licensed under this chapter, except as is otherwise herein provided; . . . "

The provision in said section 8 requiring the issuance of a special license to operators of motor-propelled fire apparatus who are members of a municipal fire department was inserted by St. 1921, c. 403. But G. L., c. 90, § 8, before such insertion, contained a provision that "special licenses shall be issued to chauffeurs"; and section 24, as it was written before such insertion, provided, as now, for the revocation of "the license" of a person convicted of the offenses enumerated in said section 24. The requirement of a special license for a chauffeur was not repealed until the passage of St. 1923, c. 464, § 3.

In the original act providing for licensing operators of automobiles (St. 1903, c. 473) there was a provision (§ 4) that "special licenses for operating automobiles or motor cycles for hire shall be issued," and section 9 of the same act (now embodied in G. L., c. 90, § 22) provided that "the commission may . . . revoke . . . *the* license issued to any person under section four of this act for any cause which it may deem sufficient." In St. 1906, c. 412, § 4, occurs the first provision making the revocation of "*the* license" mandatory after a conviction for driving under the influence of intoxicating liquor. It is apparent, then, that from the beginning of legislation upon the subject of licensing the operation of motor vehicles there has been more than one form of license which might be held by a single individual, yet, with relation to the revocation of the rights or privileges of the licensee his grant of rights or privileges in relation to operating

upon the highways has been repeatedly referred to by the statutes in the singular as "the license."

In G. L., c. 90, § 22, as now amended, the words "any license" and the words "the license" appear to have been employed by the Legislature as synonymous in the following sentence: —

"The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, for any cause which he may deem sufficient, and he may suspend the license of any operator . . . in his discretion and without a hearing, and may order the license or registration certificate to be delivered to him, . . ."

The word "the" in statutory construction may, when the context appears to require it, be interpreted as referring to more than a single thing, when more than one are of the same general nature. *Howell* v. *State*, 164 Ga. 204; *Noyes* v. *Children's Aid Soc.*, 70 N. Y. 481, 484. One of the definitions of "the" in the Century dictionary is as follows: —

"A word used before a noun to indicate a species or genus: used in generalization."

The foregoing considerations would seem to indicate an intention upon the part of the General Court that the words "the license," as used in said section 24, should comprehend all forms of particular licenses held by an individual.

There may be different forms of licenses relating to the various types of motor vehicles, but each of such special forms is, in its essential character, of the same general class or kind, namely, a grant of the right or privilege to operate motor-propelled vehicles upon the highways. The right or privilege to operate is the real subject matter of the grant to the individual, and the authority to revoke or suspend the license to operate is a bestowal of power to withdraw from the individual such right or privilege to operate upon the highway. The right or privilege is comprehensive, and in itself includes all forms of operation; and though by statutory provisions its exercise may be extended or limited in its application to different types of motor vehicles, yet, all such applications spring from the same right or privilege. (I use the expression "right to operate" in its general sense, and not within the limited significance specifically given to it in G. L., c. 90, §§ 3, 22 and 23, as amended.)

It is apparent from the entire context of G. L., c. 90, as amended, that the revocation of the license to operate of a person who has been convicted of operating while under the influence of intoxicating liquor has been required by the General Court for the purpose of promoting public safety, and that the provisions of said section 24, which in mandatory terms require the Registrar to revoke the license of a person so convicted, indicate a legislative determination that public safety will be increased by forbidding, for a time, the operating of motor vehicles upon the highways by an individual convicted of such designated offence. It would be scarcely consistent with such a legislative determination to interpret the language used by the General Court in said section 24, wherein the Registrar is required to revoke the license of such a person to operate motor vehicles, as meaning that such a person, notwithstanding conviction, may still operate motor-propelled fire apparatus.

Since the passage of St. 1930, c. 332, amending G. L., c. 90, as previously amended, a motor-propelled fire apparatus falls within the definition of

"motor vehicles," as those words are used in G. L., c. 90, and a special license to operate such a piece of fire apparatus is a license to operate a motor vehicle, over which the Registrar has power of revocation under said section 24.

I answer your question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Statutory Motor Vehicle Liability — Policy — Demerit System — Deductible Term.

Consideration of a proposed demerit system and a system of deductible payments under the existing requirements for a statutory policy for motor vehicle liability insurance.

SEPT. 9, 1931.

His Excellency JOSEPH B. ELY, *Governor of the Commonwealth.*

SIR: — Your Excellency has requested my answer to the two questions which follow: —

"1. Can a policy of insurance based on a demerit system be written under the existing automobile insurance law?

2. Can a policy of insurance calling for the payment of the first $100 by the insuring party be written legally under the present insurance law?"

1. The provisions of our statutes relating to compulsory liability insurance of motor vehicles do not specifically provide for any form of "demerit system." There may, I assume, be various kinds of systems in connection with such insurance which might be included under the term "demerit." A system which, I am advised, has been frequently suggested in connection with proposed legislative changes in the present law involves, in a general way, a scheme by which the rates for premiums that insureds are required to pay to the insuring companies are to be fixed by the Insurance Commissioner at several different amounts, varying with the accident experience of the insureds. I assume, for the purposes of this letter, that Your Excellency has some such system as this in mind. Proposed legislation looking towards the creation of a system of this character was before the General Court this year but was not enacted into law.

The Attorney General, following the practice long since established by his predecessors in office, does not undertake to pass upon questions of fact nor to express opinions upon the legality of undefined plans or schemes for administrative action, the details of which are not fully known to him. The duty of determining facts necessary to the fixing and establishing of such reasonable classifications and premium charges as are required by the Legislature for compulsory liability insurance upon motor vehicles, under the terms of G. L., c. 175, § 113B, as amended, rests upon the Commissioner of Insurance.

The law as it now stands embodied in said section requires the commissioner to fix and establish "fair and reasonable classifications of risks and adequate, just, reasonable and non-discriminatory premium charges."

It may be stated as a principle of law that the fixing or establishing of any premium charge which is not based solely upon a fair rate to the insurer for the hazard insured against, but includes also an amount added, either as a punitive measure or as a deterrent to negligence, which amount itself does not reflect with reasonable accuracy a fair payment for an

increased hazard, is not permissible under the provisions of said section 113B or of any other provisions of existing law. Premium charges, which by the terms of the said section are required to be adequate and reasonable, become more than adequate for the payment of the insured, and arbitrary instead of reasonable, if an additional amount, not ascertained by the same mode of calculation, which results in the fixing of the original charge, be added to such charge as against said insureds. The following language, used in relation to a so-called "merit" rating plan for compulsory motor vehicle liability insurance by one of my predecessors in office, sets forth in a slightly different form the same general principle of law which I have expressed, and is equally applicable to a "demerit system" as to a "merit rating plan" (VIII Op. Atty. Gen. 115): —

"If, as a matter of fact, it be possible to ascertain with reasonable accuracy from sufficiently reliable data that motor vehicle operators possessing certain well defined attainments, experience and demonstrated skill in operation are, to a clearly defined extent, less hazardous risks than other operators, it could not well be said that a classification and schedule of premium charges, lower than for others, established by the Commissioner for cars driven solely by such operators, would be unreasonable or discriminatory.

If, however, as a matter of fact, in the judgment of the Commissioner data is not available or experience is not tabulated in sufficient quantities to demonstrate with reasonable certainty the lessening in hazard to the insurer by the driving of cars by such persons instead of others, the adoption of such a classification, with incidental lower premium charges, would be unfair, unreasonable and discriminatory."

I think that the foregoing considerations answer your first question, although it is impossible to furnish you an answer in a categorical form.

2. My answer to Your Excellency's second question is in the negative. A proposed law providing for the issuance of a policy with a provision for a $100 deductible clause upon compulsory liability insurance for motor vehicles was before the Legislature this year but was not enacted.

The existing statute with relation to compulsory liability insurance for motor vehicles does not permit the writing of a policy which calls for the payment of the first $100 by the insured instead of by the insurer. The "motor vehicle liability policy," which must be secured before a motor vehicle can be operated by owners who do not furnish a "motor vehicle liability bond" or make a deposit of cash in lieu thereof, is defined in G. L., c. 90, § 34A, as last amended by St. 1930, c. 340, § 1. In its pertinent parts it reads as follows: —

"'Motor vehicle liability policy,' a policy of liability insurance which provides indemnity for or protection to the insured and any person responsible for the operation of the insured's motor vehicle with his express or implied consent against loss by reason of the liability to pay damages to others for bodily injuries, . . . to the amount or limit of at least five thousand dollars on account of injury to or death of any one person, . . ."

It is apparent from the above-quoted words of said section 34A that it was the intention of the Legislature that an insurance company should bear the whole burden of loss devolving upon the owner of a motor vehicle to the full extent of five thousand dollars. It is equally apparent that the Legislature did not intend that, in case the insured's liability in a given instance amounted to one hundred dollars or less, the insurance company

was to pay nothing and the insured all the loss. There is no statutory provision which vests authority in any official to vary the prescribed provisions of "the motor vehicle liability policy" so as to relieve the companies writing motor vehicle liability insurance of their obligations to pay losses in full.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Counties — Officers — Age.

An elective officer of Worcester County, who is a member of the retirement system, must retire at seventy.

SEPT. 12, 1931.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have asked my opinion upon the following question of law: —

"Is a county commissioner of the County of Worcester, who has become a member of the retirement system of said county under Gen. St. 1919, c. 158, required by G. L., c. 32, § 22 (4), to retire from the service of said county at the age of seventy, and prior to the expiration of the term of four years for which he was elected under G. L., c. 34, § 4?"

I answer your question in the affirmative.

G. L., c. 32, § 22, as amended, in its pertinent parts, relative to members of the retirement system, reads as follows: —

"Whenever a county shall have voted to establish a retirement system under section twenty-one, or corresponding provisions of earlier laws, a retirement association shall be organized as follows:

. . . . . .

(4) Any member who reaches the age of sixty and has been in the continuous service of the county for fifteen years immediately preceding may retire, or be retired by the board upon recommendation of the head of the department in which he is employed, *and any member who reaches the age of seventy shall so retire.*"

Provisions similar to those above set forth in said clause (4) had been in effect under previous laws, now embodied in said chapter 32, since the passage of the original statute relative to county retirement systems (St. 1911, c. 634).

It is true that the general provisions relative to the formation, membership and administration of county retirement systems, as originally set forth in said St. 1911, c. 634, and finally embodied in G. L., c. 32, as amended, are peculiarly adapted to a system of which employees rather than elective officers are members. Nevertheless, a statute was enacted in 1919 (Gen. St. 1919, c. 158) which provided for the inclusion of certain elective officers, namely, officers of the County of Worcester, in the county retirement system. Nor did such enactment make specific exemption of such officers who might become members of said system from the rule relative to compulsory retirement at the age of seventy, which, under the law as then in force, was applicable to all members of said system. Said Gen. St. 1919, c. 158, the law under which the official mentioned in your question joined the county retirement system, as you state in your letter, reads as follows: —

"Officers of the county of Worcester elected by popular vote shall be

entitled to membership in the retirement association of said county, notwithstanding the provisions of paragraph three of section three of chapter six hundred and thirty-four of the acts of nineteen hundred and eleven, and all the provisions of said chapter and of acts in amendment thereof shall, except as is otherwise provided herein, apply to the said officers."

As will be seen from the terms of the above statute, the officers of the County of Worcester elected by popular vote were not compelled to become members of the retirement system, but were entitled to that privilege if they cared to avail themselves of it.

In the codification of the General Laws the provisions of said Gen. St. 1919, c. 158, were embodied in c. 32, § 22 (3), and therein read as follows: —

"No officer elected by popular vote, except in Worcester county, nor any employee who is or will be entitled to a pension from any county for any reason other than membership in the association may become a member."

It has been suggested that the provisions of G. L., c. 32, § 91, in some manner modify the requirement of retirement at the age of seventy for elective public officers. Said section 91 reads as follows: —

"No person while receiving a pension or an annuity from the commonwealth, or from any county, city or town, except teachers who on March thirty-first, nineteen hundred and sixteen, were receiving annuities not exceeding one hundred and eighty dollars per annum, shall, after the date of the first payment of such annuity or pension, be paid for any service rendered to the commonwealth, county, city or town which pays such pension or annuity, except for jury service or for service rendered in an emergency under section sixty-eight, sixty-nine or eighty-three, *or for service in a public office to which he has been elected by the direct vote of the people.*"

I am of the opinion that the provisions of said section 91 do not exclude members of the county retirement system who are also elective officers of Worcester County from the requirement of section 22 (4) compelling retirement at the age of seventy. The portion of said section 91 which relates to service in a public office was added to the laws relative to retirement systems by Gen. St. 1919, c. 80, shortly before the passage of the act which made elective officers of Worcester County eligible to membership in the retirement system. Having been passed before the enactment of the law relative to the elective officials of Worcester County, it has no tendency to show a legislative intent to modify the provisions of the existing county retirement system law in favor of such officials.

The provisions of section 91, which made it possible for a person who is in receipt of a pension to receive in addition thereto a salary for service in a public office to which he has been elected by the direct vote of the people, necessarily assume that such person has already retired from the service of the Commonwealth or county, as the case may be, because otherwise he would not be in receipt of a pension. The only effect of section 91 is to provide that *after retirement* a pensioner may be elected to, and draw the salary incident to, an elective public office. As to whether or not he may be re-elected by popular vote to the *same office* from which he has been retired is immaterial as far as the question before me is concerned, and, accordingly, I do not express any opinion in regard thereto. Even if it be assumed that an official so retired from his elective office may be re-elected thereto by popular vote, it does not logically follow that such fact has any effect to show an intention on the part of the Legislature that he should not be required to retire at seventy, like all other members

of the county retirement system, because it does not necessarily follow from the fact that he *may* be so elected that he will *inevitably* be so elected. There is no inconsistency between the possibility of his being re-elected to an office and his being compelled to retire therefrom at a given age.

The office of county commissioner is one whose term may be established and limited by the Legislature. The provision made by the Legislature for retirement at the age of seventy may, under certain circumstances, be a limitation upon the term of the office of county commissioner. The office of county commissioner and the term thereof are therefore established and limited by the Legislature in such manner and to such extent by a maximum age provision as to incumbents. The present incumbent accepted the office so constituted and limited, and he cannot be heard to complain of the statute constituting and limiting the office; and since the term so constituted and limited is the term set up by the Legislature, it must be assumed that that was the term for which the electorate chose the particular official, who was incapable of serving for any other term by reason of the statutory provision concerning the age at which he must retire from his office.

An analogous situation was considered by the Supreme Judicial Court in *Attorney General* v. *Pelletier*, 240 Mass. 264, 296. In the opinion in that case the court considered the nature of the office of district attorney, which is held subject to a particular mode of removal established by the Legislature; and the court laid down the principle that the elective officer took his office subject to its term being limited by an application of the statutory mode of removal, and that such statute relative to his removal involved no violation of any constitutional principle of State or Federal law.

In determining the meaning of a statute, what is sometimes called legislative interpretation, expressed in or to be inferred from the terms of an act of the General Court bearing upon the statute under consideration, though subsequent thereto, is to be given some weight. Subsequent to the passage of Gen. St. 1919, c. 158, which is the original enactment of G. L., c. 32, § 22 (3), as I have previously stated, the Legislature, in 1920, by chapter 176 of the acts of that year, passed a law entitled "An Act relative to the retirement of certain officers of the County of Worcester," which reads as follows: —

"Section 1. Any present incumbent of a county office in the county of Worcester, elected prior to the enactment of chapter one hundred and fifty-eight of the General Acts of nineteen hundred and nineteen, who has not become a member of the retirement association of said county, shall be entitled to become such a member at any time prior to July first, nineteen hundred and twenty, *and shall, irrespective of age, be entitled to hold office for the remainder of his present term of office.*

Section 2. This act shall take effect upon its passage."

By the terms of the foregoing act the Legislature prescribed, particularly and specifically, for the benefit of a certain individual elective officer of Worcester County, that he should have the privilege of remaining in office until the close of the term for which he had been elected, *irrespective of age.* Clearly, the Legislature would never have passed such a statute if it had not interpreted its prior enactment (Gen. St. 1919, c. 158) as prescribing the compulsory retirement of elective county officers of Worcester County at the age of seventy.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Militia — Death of Member — Parents — Compensation.

When a member of the Volunteer Militia is killed in the discharge of his duties, without fault, his parents are entitled, if he lived with them, to compensation at the rate of two-thirds of the deceased's pay plus ration allowance.

Sept. 17, 1931.

Brig. Gen. John H. Agnew, *The Adjutant General.*

Dear Sir: — You have requested my opinion on the law relative to compensation payable upon the death, from injuries received in the service, of a member of the Volunteer Militia. You have set forth, in substance, the following facts: That one Thomas F. Guilfoil, of Worcester, was instantly killed by the accidental discharge of a machine gun on July 22, 1931, while his organization was engaged in machine-gun practice at Camp Devens; that Guilfoil was sixteen years of age and still in school; that there was no evidence that he had ever in any way contributed to the support of his parents; and that he had never engaged in any gainful occupation, other than working around the house doing odd jobs for his father, for which his father paid him three or four dollars a week, but that he ran errands for neighbors and received an average of a dollar a week from that source. You ask, in effect, whether or not, under the provisions of G. L., c. 33, § 69, as amended, any compensation, and if so, how much, is due to the parents of said deceased.

G. L., c. 33, § 69, as it was amended by St. 1927, c. 291, provides for compensation for members of the Volunteer Militia who have received injury in the course of their duties, without fault on their part, and, in case of death resulting therefrom, compensation to their dependents. The amount of such compensation and the persons entitled thereto are to be determined in accordance with the provisions of G. L., c. 152, § 1, cl. (3), and § 32, subject to § 31 of the same chapter.

Said section 1, clause (3), defines the word "dependents."

Said section 31, as amended, provides that if death results from the injury the insurer (in the instant case this would be the Commonwealth) shall pay those wholly dependent upon the employee for support a weekly payment equal to two-thirds of his average weekly wages.

Said section 32, as amended by St. 1926, c. 190, provides that a parent is conclusively presumed to be wholly dependent for support upon a deceased employee, provided that the child is unmarried and under the age of eighteen years and was living with the parent at the time of the injury resulting in death.

It is therefore immaterial to the present case whether or not the deceased ever contributed to his parents' support. The parents are conclusively presumed to be wholly dependent upon him, providing he was living with them at the date of the injury resulting in his death. If he was only temporarily absent from home while attending camp, he would still be living with his parents at the time of his death, within the purview of this act.

The next question, then, is how much should be paid to the parents.

G. L., c. 33, § 69, as amended by St. 1927, c. 291, reads, in its pertinent parts, as follows: —

"In case of death resulting from such injury, sickness or disease, compensation shall be paid to the decedent's dependents as determined in accordance with the provisions of clause (3) of section one of chapter one

hundred and fifty-two and section thirty-two of said chapter, in the amounts provided by, and otherwise subject to, the provisions of section thirty-one of said chapter; provided, that compensation to such dependents other than widows and children shall be based on the pay plus ration allowance hereinbefore mentioned, and that, for the purposes hereof, said board shall exercise all the powers given by said provisions of chapter one hundred and fifty-two to the department of industrial accidents."

The question of what the deceased earned apart from his military duties is immaterial. The compensation should be based upon his pay plus ration allowance, in accordance with the provisions of said section 31 of chapter 152. Said section 31 provides that the compensation shall be two-thirds of the average weekly wages, not to exceed, however, ten dollars a week nor be less than four dollars a week, for a period of five hundred weeks, the total compensation, however, not to exceed four thousand dollars. It is a matter of fact peculiarly within the province of your board to determine the amount of said compensation as based upon his pay plus ration allowance.

In view of the foregoing statutory provisions, the questions propounded in your letter, as to the probable earning capacity of the deceased in the future, had he lived, or the probable dependency of his parents in the future, are immaterial.

You further inquire in your letter "whether or not the board is bound by the limitation in this section" (§ 33) "of chapter 152 for $100 for the reasonable expense of burial."

The limit set on what may be paid for burial, under G. L., c. 152, § 33, as amended, is $150 and not $100.

However, the provisions of G. L., c. 33, as amended, contain no provision concerning the payment of burial expenses, nor do the terms of G. L., c. 33, § 69, as amended by St. 1927, c. 291, allow compensation to dependents to be based upon any sections of G. L., c. 152, as amended. Except section 1, clause (3), section 31 and section 32, none of the sections of said chapter 152 provide for payment of burial expenses, which are mentioned only in section 33 of said chapter 152, and the provisions of this latter section are not included within those provisions of said chapter 152 under which your board may act by reference thereto contained in said G. L., c. 33, § 69, as amended.

Very truly yours,
Joseph E. Warner, *Attorney General.*

State Prison Colony — Superintendent — Visitors — Search.

The superintendent of the State Prison Colony may, in the exercise of a proper discretion, exclude all visitors not willing to submit to be searched; but he has no authority to search them without a warrant and without their consent.

Sept. 22, 1931.

Dr. A. Warren Stearns, *Commissioner of Correction.*

Dear Sir: — You have requested my opinion upon a question which has arisen in connection with the administration of the State Prison Colony at Norfolk. In a letter to you the superintendent suggests a means by which possibility of the introduction of contraband might be

lessened, if not eliminated, namely, by the superintendent's making his permission to enter or visit the colony conditional upon the visitor's submitting himself to search or in writing expressing himself as willing to be searched. You ask whether the superintendent may legally impose such a condition upon visitors, and whether, if so, it is proper to search the visitor after he has granted the permission; also, whether the superintendent "can search a visitor before entering the grounds, without his permission."

My answer to the first two questions is in the affirmative, and to the third in the negative.

The superintendent of the State Prison Colony is, by section 41C of G. L., c. 125, as added by St. 1927, c. 289, § 1, charged with the care, custody and control of all prisoners removed to the State Prison Colony. By virtue of this duty the superintendent has a large discretion in determining what measures are necessary not only for the protection of the prisoners while they are under his control but also for their retention in that control. This power, correlative with his duty, is recognized in that provision of G. L., c. 127, § 37, which reads: —

"He [the warden of the state prison] may refuse admission to a person having a permit [from the commissioner or the warden] if such admission would be injurious to the best interests of the prison, . . ."

This provision I believe to have been made applicable to the State Prison Colony by G. L., c. 125, § 41E (added by St. 1927, c. 289, § 1), which provided: —

"All provisions of law applying generally to the institutions under the control of the department of correction shall apply to the state prison colony."

Even if no such statutory expression of the superintendent's power to exclude visitors existed, he would, in my opinion, be invested with such a power by virtue of his responsibility for the management of the colony and the custody of the prisoners. In *Shields* v. *State*, 104 Ala. 35 (1894), the court stated that a jailer, "if he apprehends injury to the jail or the introduction therein of things forbidden, or the instrumentalities of escape," may require whoever may seek admission into the jail to submit their persons to search. In my opinion, the keeper of a jail or prison would not be required to justify an exclusion of all visitors except such as would submit to search by showing that injury or danger was apprehended in each particular case, but that it is sufficient that in his judgment such a rule applying to all cases is reasonably necessary.

If consent to be searched is given by a person, there is no question but that a search of that person, unless and until such consent be withdrawn, is proper.

As to your third question, I beg to advise you that the superintendent has no power, without a warrant, to search a person upon suspicion that he may have upon his person articles which should not be introduced into the colony. If a person refuse to allow himself to be searched, the superintendent may refuse him admission, but may not search him.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Counties — Employees — Basis of Compensation — Classification.

Consideration of the provisions for the classification of county employees under St. 1930, c. 400.

Sept. 29, 1931.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — In a written communication you have asked my opinion on three questions of law at the request of the County Personnel Board, which, through a reference on appeals that it is required to make to the Director of Accounts, has a certain connection with your department. The questions appear, from the facts stated in your communication, to have a direct bearing upon an appeal now before said board for its determination, and I answer the questions for the guidance of the board in the performance of its duties. The questions are: —

"1. Does St. 1930, c. 400, require the payment of all employees on a regular salary or wage basis to the exclusion of so-called 'piecework,' or the payment on the basis of a measured unit of product?

2. If, previous to the effective date of St. 1930, c. 400, an employee had been employed on a 'piecework' basis, and if such employee had been permitted to work longer than the regular hours established for the transaction of public business, thus increasing her gross earnings, would the employing officials and the County Personnel Board be required to consider such gross earnings as the minimum amount to which she will be entitled under the provisions of section 9 of said chapter 400?

3. Under the provisions of chapter 400, section 9, above referred to, can the employing officials change the basis of compensation of an employee from 'piecework' to a regular salary basis, and if so, is there any legal 'rate of pay,' as set forth in said section, below which her salary cannot be fixed?"

St. 1930, c. 400, by section 5, amended G. L., c. 35, "by adding thereto, under the caption, County Personnel Board and Classification of County Salaries, Offices and Positions," nine new sections, numbered 48 to 56, inclusive, and, by sections 7 to 9, inclusive, set forth certain provisions applicable to such classification. It is provided therein: —

By section 48 of the amendment to G. L., c. 35, a County Personnel Board is established, the membership of which is to consist of three county commissioners, to be elected from among the various county commissioners of the Commonwealth in a designated manner.

By section 49 "every office and position whereof the salary is wholly payable from the treasury of one or more counties, or from funds administered by and through county officials," with certain prescribed exceptions, shall be classified by the board, and every such office or position now existing or hereafter established shall be allocated by the board to its proper place in such classification.

By section 50 "the director of accounts shall (*a*) prepare and submit to the board *classification and compensation plans*, together with such rules for the administration thereof as he may deem proper . . ."

By section 51 "the board shall (*a*) pass upon and finally adopt and put into effect, with such modifications, changes and additions as it shall deem proper, the classification and compensation plans and rules for their administration proposed by the director of accounts under section fifty;

. . . (*c*) pass upon and finally determine appeals relative to classification, as provided in section fifty-two . . ."

By section 52:

"The classification and allocation of offices and positions required to be classified and allocated by section forty-nine shall be according to their respective duties and responsibilities. The classification shall be established by specifications defining for each office or position or class of offices or positions the title, duties and responsibilities thereof. . . .

Any incumbent aggrieved by the allocation or classification of his office or position may, in writing, appeal to the board. Such appeal shall be filed with the appellant's board of county commissioners, who shall forward the appeal to the board, accompanied by a report and their recommendations thereon. The board shall refer the appeal to the director of accounts, who shall investigate the merits thereof and report to the board. The board shall then finally determine the appeal after hearing all persons interested."

By section 53 the duties of county commissioners with relation to the board and receiving and forwarding appeals under section 52 are enumerated.

By section 54:

"Newly elected or appointed officers or employees shall receive the minimum rate in the scale for the class to which the office or position has been allocated; provided (1) that where a person already in the service is transferred or demoted, or a former officer or employee is reinstated to an office or position in the class, he shall enter the office or position at the rate which he last received, except that, if the rate received in the former office or position is higher than the maximum of the class, he shall receive the maximum rate; and provided (2) that the board, upon recommendation of the proper county commissioners, supported by evidence of special fitness and exceptional circumstances satisfactory to them, may approve an entrance rate greater than the minimum rate; and provided (3) that less than the minimum rate may be paid in cases found by the board to be exceptional. . . ."

By section 55:

"Except as otherwise expressly provided, all salaries established under the authority of sections forty-eight to fifty-six, inclusive, shall be in full compensation for all services rendered, and every officer or employee shall pay all fees and other moneys received directly or indirectly in the course of his public employment, into the county treasury; provided, that nothing contained in said sections shall prevent the reimbursement of actual and other expenses necessary for the transaction of public business or the payment of overtime approved by the county commissioners, upon evidence of necessity therefor."

By section 56 special provisions for performance of duties in Suffolk County and by special agencies in other counties are established.

By section 7 of said chapter 400 it is provided that the Director of Accounts shall use, as a general basis for the initial classification and compensation plans which he is to submit to the board, the plans set forth in Appendix A of Senate Document 270 of 1930.

By section 8 of said chapter 400 the effective date for the initial classification and compensation plans and rates is set as January 1, 1931.

By section 9 it is provided:

"Rates of pay of officers and employees subject to this act in effect immediately prior to the effective date of classification hereunder shall be adjusted to the classified rates of compensation provided under the authority of this act in accordance with the following plan: (*a*) the rate of pay of an officer or employee receiving on said date more than the maximum prescribed for the class to which he is allocated shall not be reduced so long as he is filling the same office or position and performing the duties thereof; (*b*) the rate of pay of an officer or employee who, on said date, is paid a rate between the minimum and the maximum of his class which does not correspond with any intermediate rate shall be adjusted as early as fiscal requirements permit to the next higher rate; and (*c*) the rate of pay of an officer or employee receiving on said date less than the minimum prescribed for a class may be increased in the discretion of the county commissioners of his county to the minimum rate of the class. The right of the incumbent of an elective county office to continue to receive compensation under the provisions of this section shall not be affected by his re-election."

I assume, from the facts set forth in your communication, that the plan for classification and compensation for county offices and positions has been finally adopted and put into effect by the said board under section 51. I understand, also, from the facts which you have set forth, that the appeal now before the board, upon which they are to make a determination and with regard to which their questions relate, is that of an employee whose position, to which she has been allocated, is that bearing the title of senior typist, and that her salary in such position is the maximum appropriate thereto as such salary has been established by the board under the compensation plan finally adopted by it. I assume, also, from the tenor of your communication, that the appeal is not based upon an alleged error in the allocation or classification of the position of the employee as that of senior typist, except in so far as the maximum salary of such position, established under the compensation plan, may be in conflict with the provisions of clause (*a*) of section 9 of said chapter 400 in its application to this particular employee, inasmuch as by allocation to the said position the employee's pay is reduced below that which the employee was receiving before the plan went into effect.

The provision giving an employee a right of appeal to the board is contained in section 52 of G. L., c. 35, as amended, and is: —

"Any incumbent aggrieved by the allocation or classification of his office or position may, in writing, appeal to the board."

It is to be noted that it is not perfectly clear that an appeal will lie by an employee whose position is properly classified but whose pay is claimed not to have been properly adjusted in accordance with the provisions of section 9; but I am of the opinion that the language of the statute with reference to the right of appeal, just quoted, is to be construed broadly, and that, inasmuch as the compensation plan and the adjustments of rates of pay are so closely bound up by the statute with the allocation and classification of positions, an alleged mistake which has been committed in regard to the established compensation of an individual, due to an alleged failure to make the adjustments required by section 9, may be a subject of appeal to the board, and that any error with relation thereto may be corrected by the board.

1. I answer your first question to the effect that it appears from the whole context of St. 1930, c. 400, read in connection with Senate Document numbered 270 of the year 1930, with its Appendix A, referred to in section 7 of said chapter 400, that it was the intent of the General Court that a general scheme should be set up by which employees should be under a compensation plan which in the main required the payment of regular salaries. It cannot be said, however, that the intention of the Legislature, as expressed by the language used in said chapter 400, was to make an absolute prohibition of the classification of any positions having a compensation scheme based upon piecework, where peculiar situations existed making such classification and such payment by piecework necessary.

In the formulation of a plan such as the Legislature has endeavored to provide for, it has necessarily left much discretion in the arrangement of details to the Director of Accounts and to the County Personnel Board, and when such discretion is properly exercised it certainly cannot be said in any instance that the establishment of a regular salary is forbidden by the terms of the act, nor can it be definitely said that under certain exceptional circumstances the establishment of a classification of positions and a compensation plan bearing on such positions, establishing compensation on a basis of piecework or a system other than a salary, would necessarily be unreasonable. It would seem, however, that the establishment of salaries was the normal mode intended to be employed in putting into effect the compensation plan provided for by the General Court.

2. I answer your second question in the negative. Although the provisions of section 9 in effect forbid the reduction in compensation of a county employee by reason of the classification of his position in a group which is entitled to a maximum compensation less than the compensation which such particular employee was receiving prior to the effective date of the plan, nevertheless, it is plain that the pay or compensation of employees, which is dealt with by said chapter 400 (and the adjustments which are to be made in connection therewith), is to be paid for work performed during the regular hours established for the transaction of public business. It would follow from this that an employee who had been earning under a piece system or under any other system money for overtime work, which money so received for overtime work brought his total payments to an amount greater than the maximum set up for the class to which his position is allocated under the new plan, cannot complain if such maximum equals the amount which the same employee would have earned by piecework during the regular hours only.

3. My answer to your third question is comprehended in my answers to the other two questions. In setting up the new plan and finally adopting it, the board has authority to establish the compensation of an employee within any classified position upon a salary basis, and the amount of compensation which an individual employee in such position is to be paid must equal the amount which said employee earned previously to the putting into effect of the new plan, under said chapter 400, during the regular hours established for the transaction of public business.

In passing upon the appeal of an employee, the board will, of course, direct its attention to seeing that the employee's salary or compensation is set at an amount equal to that which he was receiving before the classification for work performed during regular office hours, even if such amount exceeds the maximum established for the class in which the employee's position has now been allocated; and in doing this the board will review all the facts relative to prior payments. If there be any error in the mode

of calculation adopted in the report from which the appeal is taken, you will, of course, correct it, so that the employee's compensation will be adjusted to exactly the proper amount which is fitting.

The Attorney General does not, of course, pass upon the facts. Nevertheless, I feel bound to call to your attention the findings made on page 3 of the report from which the appeal is taken, which appear to be in an important particular mathematically incorrect. Under the old system the appellant worked 44 hours a week as compared with 38½ hours under the new system; so that the commissioners have stated that she formerly worked 14.28 per cent more hours than at present. In the next paragraph the commissioners state: "Since she now works 14.29 per cent fewer hours we subtracted 14.29 per cent from the amount of pay she received last year, arriving at the answer $1,672.28." Five and one-half hours, which is the difference between 44 hours and 38½ hours, is, indeed, 14.28 per cent of 38½ hours, but the true basis of computation should be the number of hours which she formerly worked, namely, 44, of which 5½ hours is but 12½ per cent. The correction of this error would appear to entitle her to something like $34.89 more compensation than has been designated for her. Such mathematical computations, however, are peculiarly subjects for your board to pass upon.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Endowment Policy — Insured — Beneficiary.

Under G. L., c. 175, § 24, a child upon whose life a policy of insurance is written at the application and for the benefit of the father is the "insured."

OCT. 7, 1931.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have in a recent written communication set forth the following facts relative to certain proposed provisions of an endowment insurance policy of which your approval is required: —

"A certain life insurance company authorized to transact business in this Commonwealth has filed a form of endowment policy under said section 132.

It is proposed that this form of policy will be issued on the life of a minor child. The father of the child is to be named as beneficiary in the policy, the proceeds thereof being payable to the father upon the death of the minor prior to the expiration of the endowment period. The application for the policy is signed by the father, who is the contracting party with the company.

The form of policy contains the following provisions: —

'The . . . Company, hereby agrees to waive all subsequent premiums on the policy, continuing the insurance under the policy in full force and effect, the same as if premiums were being duly paid, if . . . (the father), hereinafter referred to as the original beneficiary, becomes totally disabled as hereinafter defined, or in the event of the death of the original beneficiary, provided such disability occurs prior to the anniversary of the said policy nearest to the 60th birthday of the original beneficiary.'

The proceeds of the policy, that is, the face of the policy, are not payable to the child upon the death of the father."

Thereafter you state: —

"The foregoing facts raise the following question of law upon which I respectfully request your opinion: Is the applicant for the policy or the beneficiary an 'insured,' within the meaning of said section 24?

I may respectfully direct your attention to an opinion of the Attorney General dated July 26, 1928, which deals with a somewhat similar question in connection with section 123 of said chapter 175."

The principle of law which governs the interpretation of the word "insured" in the policy provisions which you have quoted in your communication is set forth in the opinion of one of my predecessors in office, to which you refer in your communication and with which I agree. VIII Op. Atty. Gen. 482.

The first paragraph of G. L., c. 175, § 24, as amended, in which occurs the word "insured," as to the meaning of which you inquire, reads: —

"Any life company, whether or not it is authorized to transact accident and health insurance under clause sixth of section forty-seven, may provide in its policies of life, group life or endowment insurance, issued in compliance with this chapter, for the payment of an accidental death benefit consisting of a larger amount if death is caused by accident than if it results from other causes, and may incorporate therein or in its annuity or pure endowment contracts, issued in like compliance, provisions for the waiver of premiums or for the granting of special benefits in the event that the insured, or either of them, or the holder, as the case may be, becomes totally and permanently disabled from any cause. Such provisions shall state the special benefits to be granted thereunder, the cost thereof to the insured or to the holder and shall define what shall constitute total and permanent disability. The consideration for any benefits granted under this section shall be stated separately in the policy or contract."

The child mentioned in the instant policy, upon the hazard of whose life the policy is primarily written, is the "insured" referred to in said section 24. The child's father is a beneficiary and a contracting party, but since his life is not the principal subject of the policy he is not an "insured," as that word is used in said section 24.

The word "insured," as used in section 123, as amended, of said G. L., c. 175, was defined in VIII Op. Atty. Gen. 482, 483, as follows: —

"I am of the opinion that the word 'insured,' as used in G. L., c. 175, § 123, as amended, refers only to the individual to whom a policy is issued insuring his life, and has no reference to the beneficiary of such policy, even though such policy contains contractual provisions, as in the instant matter to which you have called my attention, which may be said to constitute a contract of insurance with the beneficiary, within the meaning of G. L., c. 175, § 2. Such contract of insurance with the beneficiary is subsidiary to the principal contract of life insurance made between the company and the person on whose life the policy is written. Although the word 'insured' has had more than one meaning attached to it in the opinions of courts, under various circumstances, I am unaware of any instance in this Commonwealth in which the word, as used in a policy of life insurance, has been interpreted by the Supreme Judicial Court as meaning any one other than the person upon whose life a policy has been written, irrespective of who might be the applicant and beneficiary of

such policy. The word as commonly used in connection with life insurance refers to an individual whose life is the principal subject of a policy."

Irrespective of any provisions of said section 123, other than those noted in the above quotation, which might tend to enforce the definition of the word "insured," as therein used, so as to exclude the father of a minor child, in like circumstances with the father referred to in your communication, from inclusion in the definition, the general principles set forth in the foregoing portion of the said opinion are applicable to the definition of the word "insured" as used in said section 24; and there being no terms of said section 24 which indicate an intent upon the part of the Legislature to use the word "insured" in any other than its common meaning in connection with life insurance, described in the above-quoted portion of the said opinion, I answer your question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Trust Company — Small Loans — Supervision.

A trust company engaging in the business of making "small loans," so called, is not required to obtain a license under G. L., c. 140, § 96, for the transaction of such business.

OCT. 8, 1931.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion upon the following question of law: —

"Is a trust company operating under chapter 172 and making loans of three hundred dollars or less, on which the interest and expenses exceed twelve per cent per annum, required by the provisions of chapter 140 to obtain a license from the Commissioner of Banks to make such loans?"

As you have set forth in your communication, trust companies are authorized, under G. L., c. 172, § 33, to act as follows with regard to loans, namely: ". . . subject to the limitations of the following section, [to] advance money or credits, whether capital or general deposits, on real estate situated in the commonwealth and on personal security on terms to be agreed upon . . ." (The following section above referred to, section 34, contains no limitation which affects your question.)

With regard to a license for the making of small loans (and by the words "small loans," as used herein, I refer to loans of the character described in your question as above set forth), the provisions of G. L., c. 140, § 96, are as follows: —

"No person shall directly or indirectly engage in the business of making loans of three hundred dollars or less if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned without first obtaining from the commissioner of banks a license to carry on the said business in the town where the business is to be transacted."

I am of the opinion, however, that although the provisions of said section 96 apply in terms to all persons, nevertheless the Legislature did not intend to require a trust company to obtain the license mentioned therein as a prerequisite to making a loan of the character mentioned in said

section 96 or in your question. The reason for this conclusion is found in the history of the statutory enactments relating to small loans.

St. 1908, c. 605, entitled "An Act to regulate further the business of making small loans," which repealed all earlier acts and parts of acts inconsistent therewith, specifically exempted, in section 6, from the necessity of first obtaining a license before carrying on the business of making small loans "national banks, all banking institutions which are under the supervision of the bank commissioner, and loan companies and loan associations established by special charter." Undoubtedly a trust company, as we now know it, fell within the description of banking institutions thus excepted.

St. 1911, c. 727, repealed St. 1908, c. 605, and, among other things, established a supervisor of loan agencies, whom it authorized, in section 20, to —

"exercise all the powers in respect to the licensing and control of persons engaged in the business to which this act applies now conferred by statute upon the bank commissioner, the police commissioner of the city of Boston, the mayor and aldermen or corresponding body in other cities, and the selectmen in towns."

I find no statutory authority which was vested in the Bank Commissioner, at the time of the passage in 1911 of said chapter 727, with respect to the licensing of persons engaged in the business of making small loans. Moreover, since banking institutions were specifically exempted from the provisions of the prior law with relation to the licensing of loan agencies, by St. 1908, c. 605, there was no authority to license such banking institutions then existing in any of the other officers mentioned in said section 20 of St. 1911, c. 727.

By the provisions of Gen. St. 1919, c. 350, pt. III, § 45, the offices of Bank Commissioner and of Supervisor of Loan Agencies, as they were then constituted, were abolished, and their functions, by this section and by section 49, devolved upon the Commissioner of Banks. Thus the power to issue licenses for the business of making small loans devolved directly upon the Commissioner of Banks, who was empowered by section 49 to appoint a deputy as Supervisor of Loan Agencies. St. 1911, c. 727, and other statutes amending it in various particulars are now embodied in G. L. (1921), c. 140, § 96, but nothing has been added to or subtracted from the provisions of the earlier statutes of 1908 and 1911, to which I have referred, which indicates a legislative intent to alter the extent of the application of the provisions of St. 1911, c. 727, which, in my opinion, as I above set forth, were not intended to and did not require the issuance of a license to a trust company, as a banking institution, before such institution might engage in the business of making small loans.

The Commissioner of Banks has, of course, under the terms of existing laws, oversight of trust companies, and may resort to the Supreme Judicial Court, if any of such companies engage in practices which are illegal, for appropriate action against any of those companies which do not carry on their business in accordance with law. G. L., c. 167, §§ 1, 6 and 22. This power so granted by the Legislature appears to have been intended by that body as a safeguard with relation to the business of making small loans, sufficient to make unnecessary the granting of particular licenses to trust companies for the doing of this kind of business.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

County Commissioners — Duty of Approval — Employee.

County commissioners may not properly approve the appointment of a "general secretarial stenographer" by a Probate Court.

Nov. 2, 1931.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — On behalf of the County Personnel Board, with which you have such a connection as to make your request for an opinion from me on their behalf a proper one, you ask my opinion "as to the proper interpretation of G. L., c. 215, § 18, particularly as to whether, under said section 18, a general secretarial stenographer can be employed payable by the county."

You have also advised me that, in a certain county, under the guise of the appointment of a stenographer a person has been appointed who, you say, "for the most part handles correspondence and performs clerical duties of a general secretarial nature. Occasionally she has taken simple testimony in uncontested cases in the Probate Court. Such work in court is incidental and does not constitute a major portion of her duties. In cases involving any degree of difficulty a regular court stenographer is habitually employed."

As has been pointed out many times in opinions given by Attorneys General, it is not the function of the Attorney General to pass upon disputed questions of fact.

I assume, for the purposes of this opinion, that the facts as you have set them forth are those found to exist by the County Personnel Board in regard to the particular position of stenographer now under consideration.

G. L., c. 215, § 18, as amended by St. 1931, c. 301, § 24, reads as follows:—

"At the trial of any issue of fact in a probate court the presiding judge may appoint a stenographer, who shall be sworn and shall attend the trial, or such part thereof as the judge may direct, and perform like duties and receive the same compensation therefor as a stenographer appointed by the superior court who is not on salary; and the sums so payable for his attendance at court and for any transcript of his notes or part thereof furnished to the judge by his direction shall be paid by the county upon the certificate of the judge. The judges of probate of any county, except Suffolk, may, subject to the approval of the county commissioners of such county, appoint a stenographer for the probate court of such county. The compensation and expenses of such stenographer shall be paid by the county."

This section in its original form, which did not include the last two sentences as now set forth, was originally enacted by Gen. St. 1919, c. 274, § 13, and was incorporated in the General Laws as section 18 of chapter 215. Said chapter 274 is entitled "Probate Courts," and a marginal note opposite section 18 reads, "Court may appoint stenographer to take testimony." The provisions for stenographic service in the Probate Court remained in this form until the enactment of St. 1923, c. 392, entitled "An Act authorizing judges of probate to appoint permanent court stenographers," which struck out said section 18 as it had previously stood in G. L., c. 215, and substituted a new section 18, which read as follows: —

"The judges of probate of any county may, subject to the approval of the county commissioners of such county, appoint and fix the compensation

of a stenographer for the probate court of such county. The compensation and expenses of such stenographer shall be paid by the county. At the trial of any issue of fact in a probate court the presiding judge may appoint a stenographer, who shall be sworn and shall attend the trial, or such part thereof as the judge may direct, and perform like duties and receive the same compensation therefor as a stenographer appointed by the superior court who is not on salary; and the sums so payable for his attendance at court and for any transcript of his notes or part thereof furnished to the judge by his direction shall be paid by the county upon the certificate of the judge."

In enacting section 18 in the above amended form the provisions relative to the appointment by the judges of probate of any county of a stenographer for the Probate Court were first introduced into the statutory law. Against this section in the Acts of 1923 appears the marginal note, "Judges of probate may appoint court stenographers."

By St. 1924, c. 194, § 1, the said section 18, as amended by said St. 1923, c. 392, was again stricken out and re-enacted in the following form: —

"At the trial of any issue of fact in a probate court the presiding judge may appoint a stenographer, who shall be sworn and shall attend the trial, or such part thereof as the judge may direct, and perform like duties and receive the same compensation therefor as a stenographer appointed by the superior court who is not on salary; and the sums so payable for his attendance at court and for any transcript of his notes or part thereof furnished to the judge by his direction shall be paid by the county upon the certificate of the judge. The judges of probate of any county, except Suffolk, may, subject to the approval of the county commissioners of such county, appoint and fix the compensation of a stenographer for the probate court of such county. The compensation and expenses of such stenographer shall be paid by the county."

The only changes in the then existing law as made by this last amendment of 1924 were to place what had been the first two sentences of the section at the end thereof, and to except the judges of probate of Suffolk County from the provisions of the last two sentences as they now stand. Against section 18, as thus amended in 1924, is a marginal note applicable to all except the first two sentences, which reads, "Judges of probate may appoint court stenographers"; and a marginal note applicable to the last two sentences as they now stand, "Permanent stenographers." The last amendment of said section by St. 1931, c. 301, § 24, merely struck out the words "fix the compensation of," with relation to the stenographer mentioned in the last two sentences of said section 18 as it now stands, and made no change in the act material to the matter before me.

It is apparent from a consideration of these various enactments that it was the purpose of the Legislature to provide that when there was a trial upon an issue of fact in a Probate Court the presiding judge was to appoint a stenographer to perform the usual duties of a stenographer in the particular matter then in hearing, and that it was also the intent of the Legislature, as expressed in these various enactments, that the judges of probate in the various counties, except Suffolk, should appoint a permanent stenographer, upon whom they might call for services as a stenographer at any time and might appoint as stenographer to take the testimony at any trial referred to in the section. It does not appear to have been the intention of the Legislature, in enacting what are now the last two sentences of said

section 18, to provide for the appointment by judges of Probate Courts of mere secretaries.

Assuming the facts to be as you have set them forth, the duties of the particular position to which you refer in your letter do not appear to be those which are commonly performed by stenographers employed by courts in this Commonwealth.

A "stenographer" is defined in Webster's New International dictionary as "one who is skilled in stenography; a writer of shorthand." "Stenography" is defined as "the art of writing in shorthand."

A position, the principal duties of which are not those of writing in shorthand, does not seem to me to be that of a "stenographer," as the word is used in the instant statute, and, therefore, a position, the duties of which comprise only those described in your letter, does not properly exist under the instant statute. The character of the service required to be rendered by a public servant is the primary test of the nature of the position to which such person is appointed rather than the designation of the position. I Op. Atty. Gen. 215, 218.

I therefore answer your question to the effect that the county commissioners of a county may not properly give their approval to the appointment of a "general secretarial stenographer" whose duties and work are of the character set forth in your letter.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Agriculture — Apples — Closed Package.

A container for apples, without a cover but with cardboard partitions between layers, may be a "closed package," within the meaning of G. L., c. 94, § 1.

Nov. 12, 1931.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR: — You have asked my opinion as to whether or not a certain type of container for apples falls within the meaning of the words "closed package" as defined by G. L., c. 94, § 1.

The definition framed by the Legislature in said section 1 is as follows: —

"'Closed package' . . . shall mean a barrel, box or other container, the contents whereof cannot be sufficiently inspected without opening it."

You state in your communication to me that the container as to which you inquire has no cover but has cardboard partitions between the layers, and after the faced or shown surface is removed it becomes necessary to take out the first cardboard partition before the layer of apples directly underneath the cardboard can be sufficiently inspected. In fact, it becomes necessary to remove all cardboard partitions before the entire contents of the package can be sufficiently inspected.

Upon the facts as you set them forth, and the Attorney General does not himself pass upon questions of fact, the contents of the container of which you write "cannot be sufficiently inspected without opening it."

The verb "to open" is defined in the Century dictionary as follows: —

"1. To make open; cause to be open; unlock, unfasten or draw apart or aside and thus afford access or egress, or a view of the interior parts; make accessible or visible by removing or putting or pushing aside whatever blocks the way or the view."

The act of removing successive layers of material to disclose the contents of all but the upper layer of apples in a container is as much an "opening" of the container as the removal of a single top cover. If the manner in which a container is fashioned or equipped is such that without such "opening" the contents cannot be sufficiently inspected, the container is, in my opinion, a "closed package," within the definition given in G. L., c. 94, § 1.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Retirement System — Commissioner of Probation — Age.

A Commissioner of Probation, appointed under G. L., c. 276, § 98, as amended, must retire at the age of seventy.

Nov. 16, 1931.

Hon. CHARLES F. HURLEY, *Chairman, Board of Retirement.*

DEAR SIR: — You have asked my opinion upon the following matter: —

"Whether or not the incumbent of the office of Commissioner of Probation, as established by G. L., c. 276, § 98, as amended, is subject to compulsory retirement at the age of seventy, under the State Retirement Act."

The office of Commissioner of Probation was created by St. 1929, c. 179, which amended G. L., c. 276, by striking out sections 98 to 100, inclusive, thereof and substituting for them new sections. The new sections relevant to the instant matter read as follows: —

"SECTION 98. There shall be a board of probation of five persons, appointed by the chief justice of the superior court, one or more of whom may be justices of the courts. Said chief justice shall annually appoint one member of the board to serve for five years from the second Wednesday in July. A vacancy in the board shall be filled in the same manner for the unexpired term. Any member of the board may be removed by the chief justice. *The board shall appoint a commissioner of probation as its executive officer, who shall hold office during its pleasure. He shall perform such duties as may be required of him by the board and shall receive such salary as it shall, subject to the approval of the governor and council, determine.* The board shall be provided with suitable office accommodations, in the Suffolk county court house or elsewhere, and may employ such assistance as is needed to perform its work. The members of the board shall receive no compensation for services hereunder, but they and the commissioner shall be allowed the necessary expenses incurred in the performance of their official duties. The board may expend for the purposes for which it is established such sums as the general court may appropriate.

SECTION 99. The board of probation shall prescribe the form of all records and of all reports from probation officers, and shall make rules for the registration of reports and for the exchange of information between the courts. It shall provide for such organization and co-operation of the probation officers in the several courts as may seem advisable. To promote co-ordination in the probation work of the courts, the board may call a conference of any or all of the justices of the district courts and the Boston juvenile court, or a conference of any or all of the probation officers and assistant probation officers, and a member of the board shall preside. With the approval of the board, the commissioner of correction or the department of public welfare may hold a conference with any or all of the pro-

bation officers to secure their co-operation in keeping trace of the whereabouts of persons who are at liberty from the prisons of the commonwealth. The traveling expenses of said justices or officers in attending any conference herein named shall be paid as the other expenses of the respective courts are paid."

The nature of the State Retirement Association and its membership is set forth in G. L., c. 32, § 2, in the following provisions: —

"There shall be a retirement association for the employees of the commonwealth, including employees in the service of the metropolitan district commission, organized as follows: . . ."

The word "employees," as used in said section 2, is defined in section 1 of said chapter 32, as amended by St. 1922, c. 341, § 1, as follows: —

" 'Employees', persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service."

Certain of such "employees," that is, "persons permanently and regularly employed in the direct service of the commonwealth," are, however, excepted from the provisions of compulsory membership in the association by the statute itself, namely, officers "elected by popular vote" and "any employee who is or will be entitled to a non-contributory pension from the Commonwealth." G. L., c. 32, § 2 (3), as amended. Judicial officers, as those words are used in the Constitution, whether or not they receive a non-contributory pension, are also to be excepted, by reason of the constitutional provisions (Mass. Const., pt. II, c. III, art. I, as amended by art. LVIII) relative to their tenure of office, which would be infringed by the provisions of G. L., c. 32, as amended, with relation to compulsory retirement, if the terms of said chapter 32 were to be interpreted as applicable to such officers. Public officers or other employees whose appointments are for short and definite terms are not so "permanently and regularly" employed as to fall within the statutory definition of "employees," and so are not held to be members of the association. V Op. Atty. Gen. 547; VIII Op. Atty. Gen. 20; 304.

The Commissioner of Probation does not fall within any of the exceptions above noted; he is not an officer "elected by popular vote"; he is not an employee entitled to a non-contributory pension; nor is he appointed for a short and definite term, but upon such tenure that, in my opinion, he is "permanently and regularly" employed in the service of the Commonwealth. He is not, moreover, in my opinion, a judicial officer within the meaning of Mass. Const., pt. II, c. III, art. I, as amended, for it is apparent that in creating the office of Commissioner of Probation it was not the intent of the Legislature to provide for the appointment of a judicial officer, within the class of "judicial officers" referred to in Mass. Const., pt. II, c. III, art. I. This is apparent from the Legislature's having required by G. L., c. 276, § 98, as amended, that the Commissioner shall hold his office *at the pleasure of the Board of Probation*, a requirement which is incompatible with the tenure of a "judicial officer" within the meaning of the constitutional provisions above noted.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

INDEX TO OPINIONS

RULES OF PRACTICE

In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the

requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application. The affidavit or affidavits should contain sufficient facts to make out a prima facie case of guilt, and should not be a reiteration of the form of the complaint nor contain conclusions of law.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

750. 4–'32. Order 4285.